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United States
Circuit Court of Appeals
For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, a corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, TRUSTEE, and A. C.
ROBINSON,

Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
W. BEAUCHAMP, CARL WASHBURN and
HAROLD M. SIMS, in their own behalf and in be-
half of all persons similarly situated with them.

Appellees.

Filed

Transcript of Record

JAN 7 - 1916

F. D. Monckton,
Clerk.

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

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Circuit Court of Appeals
For the Ninth Circuit

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*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

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Attorney for Appellees.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

NO. 494—IN EQUITY.

A. E. CALDWELL, W. F. MIKESELL, V. E.
MORGAN, J. E. POHLMAN, W. C. POND,
JAMES W. BEAUCHAMP, CARL WASHBURN
and HAROLD M. SIMS, in their own behalf and
in behalf of all persons similarly situated with
them, *Complainants,*

vs.

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, a corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a cor-
poration, JOHN M. HAINES, W. L. GIFFORD,
GRACE SHEPERD, JOSEPH H. PETERSON
and FRED L. HUSTON, constituting the STATE
BOARD OF LAND COMMISSIONERS OF THE
STATE OF IDAHO, COMMONWEALTH
TRUST COMPANY OF PITTSBURGH, Trustee,
and A. C. ROBINSON,

Defendants.

AMENDED BILL OF COMPLAINT.

*To the Honorable Frank S. Dietrich, Judge of the
District Court of the United States for the District
of Idaho, Southern Division:*

The complainants above named file this, their
Amended Bill of Complaint herein, and for their
cause of action respectfully show to your Honor:

I.

That the complainants A. E. Caldwell, W. F.

Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, were at the time of the commencement of this action, and still are, residents and citizens of the State of Idaho.

II.

That the defendant Twin Falls Salmon River Land & Water Company, was at all the times in this complaint mentioned and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Delaware and a citizen of said State, and as such corporation engaged in the building, construction and maintenance of a certain irrigation system and the sale of water rights therein for the reclamation of lands in the County of Twin Falls, State of Idaho, including the lands of the complainants hereinafter described.

III.

That the defendant, Salmon River Canal Company, Limited, was at the time of the commencement of this action and still is a corporation organized and existing under and by virtue of the laws and statutes of the State of Idaho and is a citizen of said State and is the corporation designated and provided for in the contract between the State of Idaho and the defendant Twin Falls Salmon River Land & Water Company, and intended by such contract to operate the irrigation works to be constructed by the defendant, the Twin Falls Salmon River Land & Water Company.

IV.

That the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, are respectively the legally elected, qualified and acting Governor, Secretary of State, Superintendent of Public Instruction, Attorney General and Auditor of the State of Idaho, and they are and ever since on or about the first day of January, A. D. 1913, have been and do constitute the State Board of Land Commissioners of the State of Idaho, and each and every one of the defendants in this paragraph of the Bill of Complaint named were, at the time of the commencement of this action, and still are residents and citizens of the State of Idaho.

V.

That the defendant Commonwealth Trust Company of Pittsburgh, was at the time of the commencement of this action, and still is, a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen of said State.

VI.

That the defendant A. C. Robinson, was at the time of the commencement of this action and still is a resident and citizen of the State of Pennsylvania.

VII.

That on or about the 30th day of April, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through the State Board of Land Commissioners of

said State, under and by virtue of the terms of an Act of Congress approved August 18th, 1894, "An Act making appropriation for sundry civil expenses for the year ending June 20th, 1895, and for other purposes," commonly known as the "Carey Act," and the Statutes and Laws of the State of Idaho accepting and giving force and effect thereto, under and by virtue of the terms and conditions of said contract, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct a certain irrigation system in the State of Idaho, consisting of a large storage reservoir in Twin Falls County, in said State, conserving and storing the waters of Salmon River in said State; and for the purpose of diverting and applying said waters so stored and conserved to a beneficial use, the said defendant Twin Falls Salmon River Land & Water Company agreed to construct numerous canals, laterals, head gates, weirs, aqueducts and other irrigation appliances for the purpose of conveying and distributing the said water to and over a large tract of land of the public domain within Twin Falls County, Idaho, including the lands hereinafter described, all of which said lands were segregated and set apart by the State of Idaho under the provisions of the said Carey Act, and the said irrigation system was to be constructed for the purpose of making water available to irrigate, reclaim and cultivate the lands hereinabove referred to, and in consideration of the premises, it was agreed by the said contract above referred to that the defendant Twin Falls

Salmon River Land & Water Company, should have the exclusive sale of shares or water rights in said canal for said land, and the State of Idaho agreed not to permit any person to enter upon or become the owner of any such land unless he was the holder of one share or water right for every acre entered; and it was understood and agreed that after the completion of said irrigation works, the said defendant Twin Falls Salmon River Land & Water Company should convey said reservoir and canal system to a corporation to be organized under the laws of the State of Idaho to be known and called the "Salmon River Canal Company, Limited," but that all of the stock in said corporation was to be held, voted and controlled by the said defendant Twin Falls Salmon River Land & Water Company until the holder of a share or water right in said system should pay at least thirty-five per cent. of the purchase price of such share or water right; that a copy of the said contract so made and entered into between the State of Idaho and the said defendant Twin Falls Salmon River Land & Water Company, is hereto attached marked Exhibit "A" and made a part of this complaint, and shall hereinafter be referred to as the "State Contract."

VIII.

That it was understood and agreed by and between the defendant Twin Falls Salmon River Land & Water Company and the State of Idaho, acting through the State Board of Land Commissioners of said State, in and by the agreement and contract

commonly called herein the State Contract, that the Twin Falls Salmon River Land & Water Company in no case should have the right to sell water rights or shares in said irrigation system hereinbefore referred to or in the Salmon River Canal Company, Limited, a corporation, to be formed as provided for in said State Contract, in excess of the appropriation of water for the irrigation and reclamation under said Carey Act; that the said segregation is commonly known as the "Salmon River Segregation" and the plat of the land embraced in said segregation is hereto attached, marked Exhibit "B" and made a part of this complaint.

IX.

That on or about the 1st day of June, A. D. 1908, the complainants, A. E. Caldwell, by himself or his predecessor in interest, made entry with the said State Board of Land Commissioners for the following described tract of land situated and being in Twin Falls County, Idaho, to-wit: The South Half ($S\frac{1}{2}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Three (3); Northeast Quarter ($NE\frac{1}{4}$) of the Southwest Quarter ($SW\frac{1}{4}$) of Section Three (3); Southeast Quarter ($SE\frac{1}{4}$) of the Southeast Quarter ($SE\frac{1}{4}$) of Section Four (4), all in Township Fourteen (14), South of Range Sixteen (16), E. B. M., and thereupon, and at said time, for a valuable consideration, purchased from the Twin Falls Salmon River Land & Water Company, one hundred and sixty (160) shares or water rights in said irrigation works, and to be represented by an equal number of

shares of stock in the defendant, Salmon River Canal Company, Limited, and then and there and at said time, entered into an agreement or agreements in writing with the defendant, the Twin Falls Salmon River Land & Water Company, for such purposes; that the said contract is herein referred to as the "Settlers Contract" and the copy of the same is annexed hereto, marked Exhibit "C" and made a part of this complaint.

X.

That the other complainants herein, and various other settlers upon said tract hereinbefore referred to, at various and divers times between on or about the 30th day of April, A. D. 1908, and on or about the 30th day of June, A. D. 1908, made entries either by themselves or their predecessors in interest similar to the entry made by the complainant A. E. Caldwell, for various tracts of land under said Salmon River Segregation, all lying in Twin Falls County, Idaho; such entries being fully described on complainants' Exhibit "B" herein, and the list of names of entrymen and their predecessors in interest and number of shares or water rights held by such entrymen attached to said Exhibit "B," to all of which reference is hereby made for the date of entry and description of the various tracts so entered and number of shares or water rights held by such entrymen, and that at said times above stated the complainants other than the complainant A. E. Caldwell, or their predecessors in interest and all of the settlers upon said tract, made and entered into contracts

similar to the one entered into by the complainant A. E. Caldwell, or his predecessor in interest, and similar in form and substance to the contract called Settlers Contract herein, marked complainants' Exhibit "C," and at said time and times purchased from the defendant Twin Falls Salmon River Land & Water Company, shares or water rights in said irrigation works and to be represented by an equal number of shares of the stock in the defendant Salmon River Canal Company, Limited, and for the number of such shares of each of said complainants other than the complainant A. E. Caldwell, and all settlers upon said tract, these complainants refer to their Exhibit "B" which fully sets out the number of shares or water rights so purchased by such complainants or predecessors in interest and the other settlers from the defendant Twin Falls Salmon River Land & Water Company under the terms and conditions hereinabove stated.

XI.

That on or about the first day of June, A. D. 1908, the defendant Twin Falls Salmon River Land & Water Company, sold to divers persons who at that time held entries of an equal number of acres of land of said Salmon River Segregation about Seventy-five Thousand (75,000) shares or water rights in the irrigation works hereinbefore referred to for the irrigation of about Seventy-five Thousand (75,000) acres of land on said segregation and issued to such persons contracts similar in form and in substance to the contract herein referred to as the Settlers

Contract, and attached hereto and marked Exhibit "C," and that practically all of such contracts are now outstanding and in full force and effect, and that the complainants herein and all settlers on said Salmon Tract whose names appear upon complainants' Exhibit "B" hereto attached, are now holders of such settlers contracts, either as original entrymen and contractors, or by direct or mesne conveyance, and each and all of these complainants and other settlers whose names appear upon complainants' Exhibit "B" hereto attached, hold rights in the said irrigation system hereinbefore referred to as provided for and contemplated by said contracts.

XII.

That it was understood and agreed and contemplated by the terms of said State Contract, hereinbefore referred to, that each share or water right sold by the defendant Twin Falls Salmon River Land & Water Company, should represent a carrying capacity in said canal sufficient to deliver water at the rate of one one-hundredth of one cubic foot of water per acre per second of time for each share or water right sold and should also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal, and that in no case should water rights or shares be dedicated to any lands in said segregation or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor, and under and by the terms and conditions of the Settlers

Contract herein described, the defendant Twin Falls Salmon River Land & Water Company covenanted and agreed that the owner of a share or water right in said irrigation system hereinbefore mentioned, shall be entitled to receive one one-hundredth of a cubic foot of water per acre per second of time for the lands described in said contract.

XIII.

That the appropriation provided for by said State Contract for the irrigation works and system hereinbefore referred to, consists of the normal flow of water of the Salmon River, together with the drainage thereof and none other; that the normal flow of water of said Salmon River during the irrigation season is very small and that said irrigation works is dependent entirely upon the amount of flood waters stored, saved and conserved by the said Salmon River dam; that the said dam loses a great deal of water by seepage and evaporation, the exact amount of such loss these complainants do not know, but that the amount of water so lost is and will continue to be very great; that a great deal of water is lost in transportation from the said dam to the various farm units, the exact amount of which these complainants do not know, but the same is and will continue to be very great; that the amount of the available supply of water for use on the several land entries hereinbefore referred to, after deducting the loss which does and will continue to occur on account of the matters aforesaid is inadequate to irrigate the acreage entered upon under water contracts sold

and will not exceed fifty thousand (50,000) acre feet, and these complainants allege that at no time can it be reasonably or safely determined that more than fifty thousand (50,000) acre feet will be available for the uses of water right holders in said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

XIV.

That the land of the complainants herein and all of the settlers on said Salmon Tract and included within the said segregation, is dry and arid in character and requires the artificial use of water thereon before crops of any kind or character can be raised, and that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land or to raise ordinary agricultural crops thereon, at least one-half miner's inch per acre continuous flow throughout the entire irrigation season, or at least two and three-fourths acre feet of water per acre, if delivered by periods of rotation as the needs of crops demand, is, and will continue to be necessary; said amount of water to be delivered within one-half mile of the respective land entries herein, and that such amount of water above stated, is, and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops, and will not enable the complainants and settlers upon said tract to comply with the said Carey Act regarding a permanent water supply

to reclaim said land, or to enable them to farm or cultivate their said land profitably, and that unless the complainants and all settlers upon said Salmon Tract are able to secure the said amount of water for their land a great deal of such land will remain idle and unproductive, and the owner and holders thereof will suffer great and irreparable injury and damage.

XV.

That it was provided for and contemplated by the said State Contract, and the said Settlers Contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works, to be delivered one-half mile from each quarter section of land in said segregation and sufficient in amount, time and manner of delivery to irrigate each acre of land upon which entries were made, for which shares or water rights were purchased as aforesaid in the usual, customary and ordinary manner among irrigation farmers, and to enable the owners and holders of said land to raise the ordinary, usual and profitable crops thereon, and to reclaim, cultivate and irrigate the same, and sufficient in amount, time and manner of delivery to thoroughly and properly irrigate, reclaim and cultivate each acre of said land, so as to comply with the said Carey Act and the Desert Land Laws of the United States and the Laws of the State of Idaho, and it was also provided for and contemplated by the said State Contract and the Settlers Contracts, that the water right purchased by the complainants and

other settlers on said tract per share or acre, was, and would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time, equal to one-half miner's inch, for each acre of land irrigated, by a continuous flow during the entire irrigation season from April 1st to November 1st of each year, or an equal and proportionate amount if delivered by rotation or by periods of time and in no case less than necessary to thoroughly irrigate and reclaim it as required by law and to enable the owner or holder of such land to raise ordinary and usual agricultural crops in the usual, ordinary and customary manner among farmers and irrigators, using good and reasonable husbandry; that one-half miner's inch per acre continuous flow is equal to about four and sixteen one-hundredths (4.16) acre feet per acre.

XVI.

That at and prior to the time of the making of the Settlers Contracts herein, it was represented to complainants and other purchasers of water rights or shares in said irrigation system by the defendant Twin Falls Salmon River Land & Water Company, that ample water was available to supply the rights of these complainants and all of the settlers on the said system, and that the complainants and a large number of settlers on said tract, relying upon such representations, made as aforesaid, and believing them to be true, cleared their lands or a large portion thereof, of sage and other brush, and have planted such land with grasses, trees and other crops, all of

which are now growing upon said land, and needing artificial use of water, and without which, such crops will be injured and destroyed; that the complainants herein and a large number of settlers upon said tract, actually reside upon their respective land entries with their families and have so resided thereon for a long period of time, and are engaged and have been engaged in the cultivation of their respective lands, and there is now under cultivation in said segregation approximately thirty thousand (30,000) acres of land, all of which will demand and require the use of water during each irrigation season.

XVII.

That the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused and still fails, neglects and refuses to comply with the terms and conditions of the State Contract herein set out, in that, it has failed, neglected and refused and still fails, neglects and refuses to so construct its irrigation system as to make water available, ample and sufficient in quantity to furnish these complainants and other settlers upon said tract with the amount of water contracted to be furnished, and the said defendant Twin Falls Salmon River Land & Water Company, in violation of its contract with the State of Idaho, herein referred to as the State Contract, sold large number of water contracts or shares in said irrigation system, by the terms of which it undertook to furnish to such water contract holders a great amount of water far in excess of the appropriation of water made by the defendant, or assigned

to it and especially referred to in the said State Contract, and these complainants allege and aver that the said Twin Falls Salmon River Land & Water Company has sold and delivered large amount of water from its reservoir system to persons and corporations other than actual settlers and contract holders upon said segregation, though having an insufficient supply, and the defendant Twin Falls Salmon River Land & Water Company has sold, and delivered and still sells and delivers from the irrigation system and reservoir herein referred to, large amount of water to persons and corporations other than settlers upon said Salmon Tract, all of which is contrary to the terms and conditions, and expressly in violation of said contract.

XVIII.

That the said defendant Twin Falls Salmon River Land & Water Company has failed, neglected and refused to comply with the terms and conditions of the said State Contract and the Settlers Contract herein referred to, in that it has failed, neglected and refused to supply ample and sufficient supply of water to these complainants and other settlers upon said tract, and has failed, neglected and refused to supply any amount of water in excess of about three-fourths acre feet per acre, and complainants aver that approximately three-fourths acre feet of water per acre is the only amount now available for the use of all land in said segregation, and that the defendant Twin Falls Salmon River Land & Water Company, represents and alleges that no other or

further supply of water can be obtained from any source.

XIX.

That heretofore, and before the commencement of this action, these complainants and various other settlers upon said tract have made repeated demands upon the defendants John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston, composing the State Board of Land Commissioners of the State of Idaho, to take such steps as necessary to compel the defendant Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of the said State Contract and to secure additional supply of water for said irrigation works, if possible, and if not possible, to reduce the acreage and contracts so that the total number of acres of land in said segregation should not exceed the amount of water available from said irrigation works; such water to be furnished and delivered under the terms of said State Contract and Settlers Contracts as aforesaid, but that the said State Board of Land Commissioners have failed and refused to take any steps or institute any action to bring about the results above stated, and the complainants and other settlers upon said tract have, prior to the commencement of this action, demanded that the said State Board of Land Commissioners take such action as is necessary under the laws of the State of Idaho to have the State Contract herein referred to forfeited as provided by law, or that steps be taken in court to protect the interests of the complainants and

other settlers upon said tract, but that such State Board of Land Commissioners have failed and refused and still fail and refuse to comply with such terms, or to take any steps whatever.

XX.

That patent for the land in said segregation has not issued from said United States to the State of Idaho, or to the settlers upon said tract, and the Department of the Interior is now withholding its decision for the issuance of such patents pending proof that the said land has been reclaimed within the contemplation of the provisions of the Carey Act, and has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of insufficiency of water.

XXI.

That unless there is additional water made available and supplied to the land in said segregation, so as to furnish each acre with the amount of water hereinbefore specified and necessary, or, if such amount of water can not be made available, there be canceled enough water contracts to reduce the acreage having appurtenant water rights to a point equal to the water supply, all of the complainants and other contract holders will suffer great and irreparable injury; that if each contract holder entitled to receive water is furnished only the proportionate amount of water now available, the entire segregation will be spotted with uncultivated areas or areas not properly cultivated because of insufficient water supply.

XXII.

That under and by virtue of the terms and conditions of the State Contract and the Settlers Contracts, and because of the failure on the part of the defendant, Twin Falls Salmon River Land & Water Company, to comply with the terms and conditions of said State Contract and the said Settlers Contracts, the balance due from these complainants and all settlers on said tract and all water contract holders was intended to be and does constitute a trust fund for the purpose of carrying out the terms and conditions of the said State Contract and the said Settlers Contracts and the purposes of the said Carey Act, and particularly to supply entrymen and contract holders with an ample and sufficient supply of water in a substantial ditch as hereinbefore mentioned; that there is now due from these complainants and other contract holders under said project, as it now exists, a sum equal to about Thirty-seven (\$37.00) Dollars per acre, or a total of about Two Million Seven Hundred and Seventy-five Thousand (\$2,775,000.00) Dollars; that if said tract be cut down to Thirty Thousand (30,000) acres there is and would be due about One Million One Hundred and Ten Thousand (\$1,110,000.00) Dollars.

XXIII.

That during all the times since the incorporation of the defendant Salmon River Canal Company, Limited, and since the defendant Twin Falls Salmon River Land & Water Company, has notified settlers under its system that water was available for deliv-

ery, the said defendant Twin Falls Salmon River Land & Water Company through the defendant Salmon River Canal Company, Limited, has collected large sums of money from water contract holders under said system, including these complainants, ostensibly for the purpose of applying the same on account of and for maintenance charges, but in reality such sums and a great portion thereof were used in payment of excessive and illegal salaries and expenses of the officers, employees and attorneys of the defendant Twin Falls Salmon River Land & Water Company and the said defendant Twin Falls Salmon River Land & Water Company through said Salmon River Canal Company, Limited, at all times hereinabove stated, collected such alleged maintenance charges from all water contract holders upon said Salmon Tract although only a portion of the water contracted to be delivered was in fact delivered; that said defendant Twin Falls Salmon River Land & Water Company, fraudulently applied such maintenance charges so collected as aforesaid, in paying excessive and illegal salaries of employees and attorneys and in paying exorbitant rent for buildings and in purchase of equipments for its own use and benefit, and for the use and benefit of its kindred projects and not for the use and benefit of the said Salmon River Canal Company, Limited.

XXIV.

That the defendant, the Twin Falls Salmon River Land & Water Company, is wholly insolvent and unable to respond in damages to these complainants and

other holders of contracts on said tract, and unless the several and total amounts due from complainants and other contract holders be treated as a trust fund to carry out the terms and conditions of said State Contract and the said Settlers Contracts, these complainants and all contract holders under said segregation will be without adequate remedy and will suffer great and irreparable loss and injury, and the said irrigation system will be a total failure and the said segregation and no part thereof will be entitled to patent from the United States.

XXV.

Complainants further allege and aver that they do not know positively whether or not it is practicable or feasible to secure an additional supply of water for the said segregation, but these complainants have been informed and believe, and therefore allege the fact to be, that by the expenditure of a great deal less than the amount now due from the complainants and all contract holders on said tract, a sufficient supply of water can be secured to irrigate and reclaim the tract, but if sufficient supply of water can not be secured, the said irrigation project can not be made a success unless a tract of land not to exceed Thirty Thousand (30,000) acres in extent be set apart as land subject to water rights and all other lands on the said segregations be released and declared without a water right therein.

XXVI.

That the defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal

Company, Limited, are in the actual control and operation of said system of irrigation works, and have refused and still refuse to recognize any rights of priority to the available water in said irrigation works based upon actual settlement or improvement or otherwise, and threaten to deliver water to all contract holders regardless of available supply; that unless the relative rights of all entrymen are fixed by a proper order of decree of this Court, the amount of acreage under cultivation will be so great that water will not be sufficient to irrigate the same, but only a small portion thereof, and great confusion, trouble and injury will result to all persons holding water rights in said system, as well as a multiplicity of suits prosecuted by such persons so interested to secure or protect their rights therein.

XXVII.

That the defendant, Salmon River Canal Company, Limited, is in only nominal control of said system; but that the same is under the dominion of the defendant Twin Falls Salmon River Land & Water Company, and will continue to be under the control and dominion of said Twin Falls Salmon River Land & Water Company, for a number of years to come; that the defendant Twin Falls Salmon River Land & Water Company does, and will control for a number of years to come and vote nearly all of the outstanding stock of said Salmon River Canal Company, Limited, under the power contained in the State Contract hereinbefore referred to; that the said Twin Falls Salmon River Land & Water Company elected and

selected the present Board of Directors of said Salmon River Canal Company, Limited, and all the officers thereof, and the officers of said Salmon River Canal Company, Limited, are the agents of the defendant Twin Falls Salmon River Land & Water Company; that the interests of these complainants and all settlers on said Salmon Tract and owners and holders of said contracts in said irrigation works are adverse to the interests of the Twin Falls Salmon River Land & Water Company, and that the said last named company has refused and still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters herein set out, and these complainants are compelled to institute this action, not only in their own behalf and for their own benefit, but in behalf of and for the benefit of all settlers and water contract holders upon said tract and for the benefit of said defendant Salmon River Canal Company, Limited; that by reason of the premises, it would be useless to demand and ask the defendant Salmon River Canal Company, Limited, to institute and prosecute this action.

XXVIII.

That the defendant Twin Falls Salmon River Land & Water Company, through the defendant Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to consumers; that the said Twin Falls Salmon River Land & Water Company and the said Salmon River Canal Company, Limited, have refused and still refuses to supply complainants and other

contract holders upon said contract the water as contemplated by said State Contract and Settlers Contracts, fraudulently pretending that the water as heretofore supplied is ample for the acreage entered, and the said defendants Twin Falls Salmon River Land & Water Company and Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by said contracts and as required, but in fact delivered water to such settlers, including these complainants, in a very much less amount; that unless this Court, during the pendency of this action appoint a receiver or receivers, and takes possession of said irrigation works and operate the same for the benefit of those entitled to water therefrom, the said defendant Twin Falls Salmon River Land & Water Company will continue to oppress these complainants and the other settlers upon said tract, and such conduct can only result in a multiplicity of suits; that the said defendant Twin Falls Salmon River Land & Water Company, and the defendant Salmon River Canal Company, Limited, because it is under the control and dominion of the said defendant Twin Falls Salmon River Land & Water Company, have refused and still refuses to adopt a reasonable or proper system of delivery, or one required by the condition of the crops, and have refused and still refuses and will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or permit such water contract holders to have a voice in determining when water should be delivered, or to receive the amount of water con-

tracted to be delivered; that the said defendants Twin Falls Salmon River Land & Water Company and said Salmon River Canal Company, Limited, have adopted and do adopt a system of delivery by periods, but have not delivered and will not deliver an ample supply of water during such period, or on demand, or as the needs of the crops require; that the result of such methods and system of delivery as aforesaid, has been to cause hardship, annoyance and loss of crops; that to continue the same will produce great loss and damage and numerous claims for set-offs and reimbursements from the several amounts due from settlers to said trust fund and greatly affect the said trust fund and the collection thereof; that unless the said settlers upon said tract can receive water as agreed in their contracts, and as provided for in said State Contract, they, and each of them will refuse to pay towards said trust fund the amount due from them under and by virtue of the terms of their respective contracts; that the collection of said trust fund by a Receiver or Receivers can not be effectually accomplished unless all matters connected with said contracts, including the operation of said irrigation works, is taken under the control of this court through its Receiver.

XXIX.

That heretofore, and before the commencement of this action, and on or about the first day of June, A. D. 1908, and long time prior to the construction and completion of the irrigation works hereinbefore referred to, and prior to the time that any water was

made available to contract holders upon said Salmon Tract, the defendant Twin Falls Salmon River Land & Water Company, made, executed and delivered a pretended deed of trust to the defendant American Trust & Savings Bank, Trustees, by the terms of which said deed of trust, the said defendant Twin Falls Salmon River Land & Water Company pretended and attempted to create a lien upon all dams, reservoirs, canals, ditches, laterals, head gates, flumes and the entire irrigation system of the said Twin Falls Salmon River Land & Water Company, together with all lands, rights of way, easements, privileges and franchises for same, and all appliances and power connected therewith, then owned or thereafter acquired, and also all notes, contracts and mortgages then owned or which may thereafter be acquired by said Twin Falls Salmon River Land & Water Company in consideration of sale of water rights, and covenanted and agreed under and by virtue of the terms and conditions of said deed of trust to assign in writing all contracts for water rights in said irrigation system, and complainants aver that the said Twin Falls Salmon River Land & Water Company, did, prior to the commencement of this action, assign practically each and all water contracts it made with settlers to said American Trust & Savings Bank; that the said deed of trust attempted to create a lien for the sum of Four Million (\$4,000,000.00) Dollars to secure bonds issued or to be issued by the defendant Twin Falls Salmon River Land & Water Company, and the said defendant the

American Trust & Savings Bank, thereupon, and on or about said time, accepted said trust for the uses and purposes therein set out; that the said Deed of Trust was filed for record on August 22nd, A. D. 1908, in the office of the County Recorder of Twin Falls County, Idaho, and recorded in Book 5 of Mortgages at pages 302 to 325 inclusive, and the same is now of record in the office of said County Recorder and purports to be a lien on said irrigation system of the defendant Twin Falls Salmon River Land & Water Company and upon all of the contracts of these complainants and all other settlers and contract holders upon said tract with the Twin Falls Salmon River Land & Water Company; that complainants refer to Book 5 of Mortgages of Twin Falls County, Idaho, pages 302 to 325 inclusive, for a copy of said Deed of Trust, and by such reference make said record and copy of said Deed of Trust a part of this Bill as Exhibit "D," with the same force and effect as if the same were here in full set out and attached hereto.

XXX.

That thereafter and on or about the 8th day of October, A. D. 1914, the said American Trust & Savings Bank, Trustee, duly tendered its resignation as such Trustee, and thereupon, and at said time, delivered and conveyed to the defendant, Commonwealth Trust Company of Pittsburgh, all the rights, liens and property it held under and by virtue of the Trust Deed referred to in paragraph XXIX of this Amended Bill, and on or about the 9th day of October, A. D.

1914, the defendant Twin Falls Salmon River Land & Water Company, appointed the said Commonwealth Trust Company of Pittsburgh as Trustee under said trust deed to act in place and stead of the said American Trust & Savings Bank, and the said Commonwealth Trust Company of Pittsburgh duly accepted such trusteeship on the 9th day of October, A. D. 1914; that the resignation of said American Trust & Savings Bank, the original trustee under the trust deed herein referred to, was duly filed for record in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, and recorded in Book 2 of Miscellaneous Records at page 367, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully set out; that the appointment of the defendant Commonwealth Trust Company of Pittsburg as Trustee in place and stead of said American Trust & Savings Bank, the original Trustee mentioned in said trust deed, was duly filed for record and recorded in the office of the Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at page 369, and these complainants refer to said record, and by such reference make the same a part of this Bill with the same force and effect as if it were here fully set out; that the acceptance of the trusteeship under said Trust Deed by the said Commonwealth Trust Company of Pittsburgh was duly filed for record and recorded in the office of the Re-

corder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 2 of Miscellaneous Records at pages 371 and 372, and these complainants refer to such records, and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXI.

That by reason of the matters and things set out in this Bill of Complaint and by reason of the fact that the defendant Twin Falls Salmon River Land & Water Company, has failed, neglected and refused to comply with the terms and conditions of the said State Contract hereinbefore referred to and the said Settlers Contracts and by reason of the fact that the Twin Falls Salmon River Land & Water Company has failed, neglected and refused, and still fails, neglects and refuses to so complete its said irrigation system as to comply with the terms and conditions of the State Contract and Settlers Contracts, and to furnish and make available the water required by it to be furnished to the contract holders with it in accordance with the terms and conditions of said State Contract and said Settlers Contracts, the pretended lien of said deed of trust, if any, is subject and subordinate to the rights of the purchasers of shares or water rights in said irrigation system, and the grantee in said deed of trust took said deed of trust, subject to the conditions herein set out, and by reason of the premises, the pretended lien of said deed of trust is null, void and of no effect as against these

complainants and other water contract holders in said irrigation system.

XXXII.

That thereafter, and on or about the 14th day of October, A. D. 1914, the defendant, Twin Falls Salmon River Land & Water Company, made a pretended assignment to the defendant A. C. Robinson by the terms of which it sought to sell, transfer, assign and set over unto the defendant A. C. Robinson, contracts for the supply of water by the Twin Falls Salmon River Land & Water Company made with various persons; that such pretended assignment set forth the names of the persons with whom such contract was made, the face value of the amount due under such contracts, the number of such contracts and the number or letter of the public records of Twin Falls County wherein the said contracts were recorded; that the total amount of the unpaid balance upon such water contracts assigned as aforesaid were set out in said assignment at One Hundred Ninety-four Thousand Three Hundred Ninety-seven and 48-100 (\$194,397.48) Dollars; that the said pretended assignment above referred to was filed for record and recorded in the office of the County Recorder of Twin Falls County, Idaho, on the 19th day of October, A. D. 1914, in Book 3 of Assignment of Water Contracts at page 1, and these complainants refer to said records above mentioned and by such reference make the same a part of this Bill with the same force and effect as if the same were here fully and at length set out.

XXXIII.

That the pretended assignments referred to in the preceding paragraph of this Bill were made wholly without any valuable consideration, and these complainants are informed and believe and allege the fact to be that the defendant A. C. Robinson threatens to collect the amounts due from the water contract holders described in said assignment, and the said A. C. Robinson will collect said amounts or the greater part thereof unless restrained from doing so by an order or decree of this Court.

XXXIV.

That the questions sought to be determined in this action are of common and general interest to all settlers upon said Salmon Tract and all water contract holders similarly situated with the complainants herein, and they constitute a class so numerous as to make it impracticable to bring them all before this court, and by reason thereof, these complainants bring this action in their own behalf and on behalf of all other settlers and water contract holders upon said tract similarly situated with them.

XXXV.

That by reason of the premises and the matters and things set out in this bill of complaint, these complainants and all other settlers upon said Salmon Tract have not a plain, speedy or adequate remedy at law, and unless this Court grant them the relief herein sought, they and each of them will suffer great and irreparable wrong and injury and will be wholly remediless.

Wherefore, complainants pray the judgment of this Honorable Court:

a. That it be adjudged and decreed that the amount due from each and every complainant and from each and every settler and contract holder of water rights in said irrigation system herein referred to entitled to receive water under the order of this Court, constitute a trust fund for the purpose of carrying out the objects and purposes of the said State Contract and the Settlers Contracts set out in this complaint, and particularly to furnish each and every acre of land having water rights appurtenant to it from said irrigation works with an ample and sufficient supply of water as contemplated by said State Contract and said Settlers Contracts and not less than one-half miner's inch per acre continuous flow or two and three-fourths acre feet per acre if delivered by periods upon demand of the several owners thereof, measured and delivered not more than one-half mile from each quarter section of land on the said irrigation system, and that the trust so declared and created be prior and superior to the rights or claims of any and all persons whatsoever; that the pretended lien created or attempted to be created by the defendant Twin Falls Salmon River Land & Water Company under and by virtue of the deed of trust made by it to the American Trust & Savings Bank, Trustee, and now claimed by the substituted Trustee, the defendant Commonwealth Trust Company of Pittsburgh, and described herein as complainants' Exhibit "D" be canceled and declared to be void and of no effect and held for naught

and declared to be subject and subordinate to the rights of the complainants and other water contract holders in said irrigation system as in this complaint set out, and the said defendant Commonwealth Trust Company of Pittsburgh, Trustee, or any holder of bonds issued by the defendant Twin Falls Salmon River Land & Water Company, be restrained and enjoined from collecting any sum or sums of money due from contract holders on the said irrigation system upon such contracts either as principal or interest, and that the defendant A. C. Robinson be restrained and enjoined from collecting any monies upon the water contracts assigned to him by the defendant Twin Falls Salmon River Land & Water Company as hereinbefore set out, and that such pretended assignment of such water contracts be declared to be void and of no effect and set aside.

b. That a Receiver be appointed according to the law and the usage of this Court, and that such Receiver be authorized, directed and empowered to take immediate possession of the irrigation system in this complaint referred to and to receive and collect all sums due from all water contract holders in said irrigation system entitled to receive water therefrom under the order of this court, including interest, and to hold, use and dispose of the same as directed by this Court for the purposes in this complaint set out, and that each and all of the complainants and all water contract holders in said irrigation system who are to receive water therefrom under the order of this Court be authorized and directed to pay any and all sums due on said contracts to said Receiver, and

that the said defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, and each of them, and their and each of their agents, officers, attorneys, servants, employees and assigns, be restrained and enjoined from collecting or attempting to collect any such sums of money so due from any settlers or water contract holders in said irrigation system, or their assigns.

c. That the said Receiver be empowered and directed to secure additional supply of water for such segregation, if the same be found feasible; or, in lieu thereof, this Court direct the manner and method of reducing the said segregation to a point within the water supply, so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these complainants as stated in this complaint, and that the water rights and water contracts for all land beyond and outside of said area so established as aforesaid, be annulled, canceled and held for naught, and the defendant Salmon River Canal Company, Limited, be authorized and directed to cancel the corporate stock therefor, and be restrained and enjoined from recognizing such land as entitled to water, or from delivering or furnishing water to or for said lands.

d. That it be adjudged, decreed and determined that in the event such segregation be reduced as aforesaid, the owner or holder of the land and appurtenant water right, be entitled to receive from the said trust fund under the direction of this Court, any

and all sums of money paid on account of the purchase of said water right, with legal interest thereon, together with all other legal damage to be determined by this Court, resulting to such owner or holder by reason of the cancellation of his said water right.

e. That this Court decree, determine and fix all priorities existing, if any, by reason of settlement and improvement, and that pending a final determination of this action, the defendants Salmon River Canal Company, Limited, and Twin Falls Salmon River Land & Water Company, be enjoined and restrained from delivering or furnishing any water to any land not actually in cultivation at the time of the filing of this complaint.

f. That the said Receiver be authorized and directed to take immediate possession and control of said irrigation system described in this complaint and to deliver and furnish water as covenanted to be furnished on the terms and conditions of the Settlers Contract and State Contract herein to the lands entitled thereto, and that the said Receiver take possession of all monies due or collected for maintenance for the year 1914, and for the subsequent years if the Receiver be in charge of said irrigation system, or until further order of this Court, and use and expend the same in the operation and repair of said irrigation system, and that the defendant Twin Falls Salmon River Land & Water Company and the defendant Salmon River Canal Company, Limited, their servants, agents, officers and employees be directed to turn over the money col-

lected by them, if any, for maintenance charges during the year 1914 to said Receiver.

g. That the said Receiver be authorized and directed to maintain the expenses incurred by these complainants in this action, and to pay the costs, attorneys' fees, witness fees and other proper items of expense as may be directed by this Court.

h. That the said Receiver be authorized and directed to issue Receiver's certificates from time to time as may be ordered by this Court for the purpose of said Receivership.

i. That the defendant Twin Falls Salmon River Land & Water Company be compelled to account to this Court for any and all sums converted and used by it from the maintenance charges collected by the defendant Salmon River Canal Company, Limited, and misappropriated by said Twin Falls Salmon River Land & Water Company as in this Bill set out.

j. That these complainants and all water contract holders in said irrigation system hereinbefore described, have such other or further relief in the premises as may be just and equitable, together with the costs and disbursements of this action.

Answer under oath waived.

C. O. LONGLEY,

W. E. GOLDEN,

Solicitors for Complainants,

Residing in Twin Falls, Idaho.

Duly verified. Endorsed: Filed Nov. 9th, 1914.

A. L. Richardson, Clerk. By E. B. Yarrington,
Deputy.

PLAINTIFF'S EXHIBIT "A."

FILED WITH AMENDED COMPLAINT.

(Title of Court and Cause.)

AGREEMENT BETWEEN THE STATE OF IDAHO AND TWIN FALLS SALMON RIVER LAND AND WATER COMPANY.

This Agreement, Made and entered into in duplicate this 30th day of April, 1908, by and between the State of Idaho, the party of the first part, through the *State Board of Land Commissioners* of said State, said Board consisting of Frank R. Gooding, Governor, Robert Landson, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said State, and the *Twin Falls Salmon River Land and Water Company*, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho (having complied with the laws thereof relative to foreign corporations), the party of the second part, *Witnesseth*; That

Whereas, the party of the second part has succeeded to all the rights of C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister for the irrigation of lands in Twin Falls County, State of Idaho, which rights are evidenced by the Proposal and Request heretofore made by them on the 12th day of August, 1907, which Proposal and Request were approved by the State Board of Land Commissioners of the State of Idaho on the 12th day of August, 1907, and

Whereas, all of the property rights and franchises of the said C. B. Hurtt, George F. Sprague, I. B. Perrine and H. L. Hollister acquired under and by virtue of the said accepted proposal and request have by the consent of the State Board of Land Commissioners been duly transferred to the party of the second part herein.

It is Mutually Agreed and Covenanted as follows:

Purpose of the Contract.

1. That for and in consideration of the covenants of the said party of the first part herein contained, the party of the second part agrees to construct and build those certain irrigation works mentioned and described in the aforesaid Proposal and Request dated on the 12th day of August, 1907, and hereinafter more particularly described and to sell shares or water rights in said canal and irrigation system from time to time as hereinafter provided to the person or persons filing upon the lands hereinafter described and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system or from any extension or enlargement thereof; said shares or water rights to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of shares or water rights as hereinafter provided.

GENERAL SPECIFICATIONS FOR CONSTRUCTION.

Reservoir.

II. The reservoir is to be formed by a masonry dam two hundred and ten feet in height, five hundred and fifty feet long on top, founded upon a solid rock foundation and extending from wall to wall of the lava Canyon on Salmon River in Section 18, Township 14 South of Range 15 East, Boise Meridian, in Twin Falls County, State of Idaho.

The reservoir formed by the dam will have a surface area of over three thousand acres, an available capacity of 180,000 acre feet and will extend southward from the dam a distance of approximately twelve miles.

Dam.

The dam will be constructed of rock solidly imbedded in concrete. Its top width to be fifteen feet, its bottom width (210 feet below the crest) will be one hundred and nineteen feet; it will be built upon an arch of two hundred and twenty-five feet radius and with a height and length as above specified.

Tunnels.

The water will be diverted from the reservoir through a tunnel ten feet by ten feet in Section equipped with suitable metal gates in concrete settings.

The first tunnel will be approximately 2500 feet long followed by an open cut approximately 800 feet long which cut will be followed by a second tunnel

of the same length and cross section as the first. The tunnels are to be concrete lined where necessary and to be built upon a grade of one in one thousand.

Canal.

Beyond the end of the second tunnel described above the water shall be conveyed in open channels to the land to be reclaimed, using in part artificial channels and in part natural channels of suitable section grade and character of material. Both natural and artificial channels shall have a capacity of one-hundredth of one second feet of water for each acre of land served by them.

The main canal above the first point of distribution shall have a capacity of one thousand second feet, which is likewise the capacity of the tunnel section.

The grades and cross sections of the canal may vary to suit the local conditions and natural channels or coulees shall be utilized when suitable.

In earth sections, the main canal shall have a bottom width of thirty-two feet, a water depth of eight feet, the sides shall have slopes of three to one and the grade of the canal shall be one in five thousand.

Outlets from the main canal shall be built of concrete or other equally durable material with gates of wood or steel.

The canal system is to be surveyed and laterals are to be hereafter located, all entries of land being made subject to such location.

Changes in these plans and specifications may be

made by second party with the consent of the State Engineer and the State Board of Land Commissioners.

Detailed plans will be hereafter filed with the State Engineer and with the State Land Board and when so approved, shall become final.

Right of Way.

III. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho or that may be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act or by any other laws (and particularly the lands hereinafter described), for the construction and operation of said canals, reservoirs and distributing system therefrom and for the necessary waste ditches which right of way shall be equal to the actual width of the canal, lateral or waste ditch, at its base from toe to toe of the embankment together with a strip of land along one side of such canal, lateral or waste ditch adjacent thereto not to exceed fifty feet in width along the main canal, thirty (30) feet in width along the laterals branching from said main canal and a proper width along the smaller laterals and waste ditches; said right of way to be located and designated by the Chief Engineer of the party of the second part and approved by the State Engineer and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch in proportion as the necessity therefor exists and all water users on lands irrigated from said canal or laterals shall have

such right of way as may be necessary from second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use and such right of way across said land as may be necessary for waste ditches.

No more laterals, service or waste ditches shall be constructed across any premises than are necessary in the opinion of the Chief Engineer of the Company and the State Engineer. The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company and subject to the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises, he shall have the right to appeal to the State Engineer whose decision shall be final.

Detailed maps showing the location of canal, laterals, reservoir and waste ditches shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement. No compensation shall be paid to land owners for the right of way herein provided for.

Appropriation of Water.

IV. The party of the second part is the owner of that certain water right evidenced by permit No. 2659 for 1500 cubic feet per second of the waters of Salmon River in Twin Falls County, State of Idaho, issued by the State Engineer of the State of Idaho, to be used for the irrigation of the lands described

in Exhibit "A" herewith, together with other lands susceptible of irrigation from said system, which water right is hereby dedicated for use upon said lands and it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of the said stream during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated.

And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of one-hundredth of a second foot per acre for each acre of land to be irrigated.

Entry of Lands.

V. Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated the said party of the first part will, after notice given in conformity with law, throw open the hereinafter described lands or a specified portion thereof for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

Application for Lands.

VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the person or per-

sons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

VII. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon

the same for the sum of Fifty cents (\$.50) per acre, half of which sum shall be paid at the time of application for the entry of such lands made to said Board and the remaining one-half at the time of the making of final proof thereon.

Price of Water Rights.

VIII. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owners of any other lands not described herein but which are or may be susceptible of irrigation from its canal system by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal; said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board, which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares

shall be sold to the person or persons aforesaid for the lands hereinafter described or for lands which are susceptible of irrigation from said system as follows:

To the person or persons filing upon any of said lands at a price not exceeding Forty Dollars (\$40) per share to be paid for as follows:

One-fifth (1-5) in cash at the time of sale and the remainder in five equal annual installments bearing interest at the rate of six per cent. (6%) per annum payable annually. To the person or persons purchasing any portion of sections No. 16 or 36, which are susceptible of irrigation and reclamation from this canal at a price not to exceed Thirty Dollars (\$30) per share provided said water rights are purchased within one year after the purchase of the lands from the State and not exceeding Forty Dollars (\$40) per share at any time thereafter; said payments upon said State lands to be made one-seventh (1-7) at the time of purchase and the remainder in six (6) equal annual installments with interest thereon at the rate of six per cent. (6%) per annum payable annually. In case the purchaser or entryman on desert lands, homestead lands or any lands other than those segregated under the Carey Act declines to purchase water rights within one year after the Carey Act lands are thrown open for settlement, the sum of two dollars and forty cents (\$2.40) may be added to the price of water rights for each year's delay or fraction thereof. No charge shall be made for water rights for lands taken by the right of way for any

railroad filing its plat with the State Board of Land Commissioners prior to June 1, 1908, and all entries of land shall be made subject to such right of way.

This agreement shall not be construed to prevent the sale of shares or water rights on terms more favorable than those herein provided or to prevent the payment of installments on the purchase price in advance of maturity of the same at the option of the purchaser but in no case shall water rights or shares be dedicated to any lands before mentioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

IX. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein; for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting toll charges and assessments for the carrying on and maintenance of said canal and the operation and management thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement a corporation to be known as the Salmon River Canal Company, Limited, shall be formed at the expense of the party of the second part, the articles of incorporation of said Company to be in substantially the form which is filed here-

with and made a part hereof; that the authorized capital stock of said corporation shall be one hundred and fifty thousand shares (150,000) which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same; said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to the purchasers of land under this irrigation system. At the time of the purchase of any water right or as soon thereafter as convenient there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon; that the said party of the second part therein shall in case of said water rights or shares of stock are not fully paid for require the endorsement and delivery to it of said stock and shall at the same time require of said purchaser an agreement that until thirty-five per cent. of the purchase price of said stock has been paid, the said party of the second part therein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation and the said Salmon River Canal Company shall have the management, ownership and control, as above set out, of the said

canal system as fast as the same is completed and turned over by it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of the said canal are completed for the purpose of operation, the same may, with the consent of the State Land Board be turned over to the Salmon River Canal Company, Limited, for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of the contract, nor shall such consent on the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of such canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

Water Rights Dedicated.

X. The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV. and VIII. of this contract and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein.

While the party of the second part shall retain control of the said Salmon River Canal Company,

Limited, water shall be measured to users from the place of division at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited.

The sale of the water rights to the purchasers shall be a dedication of the waters to the lands to which the same is to be applied. Water shall only be delivered through said system during the irrigation season, to-wit, between April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

Management of Water and Charges for Delivery.

XI. The party of the second part agrees to construct the said canal system so that the water conducted through the same may be available at a point not to exceed one-half mile measured in a direct line from each quarter section of land herein described

and to be irrigated and reclaimed by water conducted through said canals; that it will construct and place in position all head-gates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals it being intended that the settler shall under the directions of the Chief Engineer of the second party build and furnish one gate or measuring device for his own use but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party.

Plans for measuring devices, head-gates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water prior to the first day of January, 1911. For each succeeding year thereafter while the second party retains the control of the said Salmon River Canal Company, Limited, said company may charge and assess the purchasers of water rights in said irrigation system the sum of thirty-five cents (\$.35), per acre for each acre of land for which a water right has been purchased; said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient prior to January 1st, 1913, for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, the said second party will furnish the additional funds necessary to supply such deficiency. After said date, the actual cost of maintenance is to be paid by the settler.

A main lateral, within the meaning of this contract, is a lateral taken from the main line of this canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral shall also be included within these terms.

Completion of System.

XII. Said party of the second part agrees to begin work on said irrigation system within six months from the date of this contract and to complete 1-5 of the construction work within two years from this date; that the construction work shall be prosecuted diligently and continuously to completion and that a cessation of work under this contract for a period of six months after the second year without the sanction of the State Board of Land Commissioners will forfeit to the State all rights under this contract.

Second party agrees to have said canal system constructed in accordance with this contract within five years from the date hereof; it being understood, however, that detailed plans and specifications of said work have not yet been completed and that such detailed plans and specifications are to be approved by the State Engineer and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Forfeiture.

XIII. It is agreed that the rights of second party herein may be forfeited in accordance with the

laws of the State of Idaho relative to that subject which are now in force and effect.

Estimated Cost.

XIV. The estiated cost of the proposed irrigation works is \$2,500,000 and upwards and the price at which water rights are fixed herein and for which liens are hereby authorized and created against the separate legal sub-divisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

XV. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho, under and pursuant to the Act of Congress approved August 18th, 1894, and the Amendments relating thereto, commonly called the Carey Act, and also other lands hereinafter described, the irrigation and reclamation of which lands this contract is designated to effect. The lands to be reclaimed under said "Carey Act" are fully set forth in the list herewith marked Exhibit "A" which is hereby referred to and made a part hereof.

Highways.

XVI. Entries of land are understood to be made subject to a right of way without compensation to the entrymen, for roads upon all exterior section lines, and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

Water Supply.

For Cities and Towns.

XVII. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established or the inhabitants therein. Said cities and towns or the inhabitants thereof must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them and shares of stock of the Salmon River Canal Company, Limited, shall be issued for the amounts of water represented by said use to the inhabitants thereof or to the trustees of any village or the mayor of any city in trust for the use and benefit of the towns and cities and inhabitants thereof.

Delivery of Water to Users.

XVIII. It is agreed that the said Salmon River Canal Company, Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights, or who are not holders of stock in said Salmon River Canal Company, Limited, or who are not otherwise entitled thereto under this contract.

Mortgage.

XIX. The right, title and interest of the second party in the irrigation works and system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

XX. This contract may be altered and amended by the first party with the consent of the second party for the purpose of carrying out the object of the contract and for the purpose of meeting any conditions now unforeseen.

Detailed plans and specifications shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval.

With the consent of the State Land Board, the irrigation system hereby contracted for may be enlarged by second party so as to cover lands not under the irrigation system, as at present designed, such extensions, however, to be a part of this system.

Coulees and Draws.

XXI. Coulees and draws may be used as waterways when convenient, but all coulees and draws utilized as laterals from which water is to be taken by settlers for irrigation shall be so constructed and improved as to practically conform to artificially constructed laterals of like capacity so that water may be available for use from the same, in practically the same manner and at approximately the same expense, and it is further agreed that the specifica-

tions as to the construction and improvement of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed in order that no unnecessary improvement of coulees need be made.

With the consent of the State Land Board, changes may be made in the number, location and capacity of the reservoirs.

Whereas: All the requirements of the law have been, in so far as this contract is concerned, fully met and in every respect complied with; the execution of this contract is therefore ordered.

In Witness Whereof, The said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners caused this agreement to be signed in duplicate by its governor, who is ex-officio president of said State Board of Land Commissioners, and attested by the registrar of said Board.

And, the said party of the second part has hereunto caused its corporate name to be subscribed by its proper officer and to be duly attested, as provided by resolution of this Board of Directors.

STATE BOARD OF LAND COMMISSIONERS,

By F. N. GOODING,

Governor and Ex-officio President.

Attest:

M. J. CHURCH,

Registrar.

TWIN FALLS SALMON RIVER LAND AND
WATER CO., By W. S. KUHN,

Attest:

President.

A. E. DeBOIS,

Assistant Secretary.

Endorsed: Filed November 9th, 1914. A. L.
Richardson, Clerk. By E. B. Yarrington, Deputy.

PLAINTIFF'S EXHIBIT "C."
FILED WITH AMENDED COMPLAINT.

Contract No.....

TWIN FALLS SALMON RIVER LAND AND
WATER COMPANY.

AGREEMENT.

This Agreement, Made in duplicate this.....day
of.....,19..., between the TWIN FALLS
SALMON RIVER LAND AND WATER COM-
PANY (for convenience hereinafter called "the
Company"), a corporation organized and existing
under the laws of the State of Delaware, party of
the first part, and.....
(for convenience hereinafter called the "purchaser")
of....., State of.....,
party of the second part, witnesseth:

That the Company has heretofore entered into a
contract with the State of Idaho, acting by its State
Board of Land Commissioners, whereby the com-
pany bound itself to construct a system of canals

and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which contract is of record in the office of the Register of the State Board of Land Commissioners at Boise City, Idaho, and is dated April 30th, 1908, and is hereinafter called the "State contract."

That the Company has heretofore entered upon the work of construction of said irrigation system for the purpose of diverting from Salmon River the waters thereof under the appropriation of John E. Hays made December 29th, 1906, recorded in Book 8 of Water Rights, at page 2659, records of State Engineer's office of the State of Idaho, being permit No. 2659 issued by the State Engineer of Idaho, together with other water rights taken for use on the lands hereinafter described.

That the State Board of Land Commissioners, pursuant to law and its rules and regulations, has notified the Company that it may proceed to sell or contract rights to the use of water flowing and to flow through the canals and rights to and in said system of irrigation works, pursuant to law and to the terms of said contract with the State.

That the purchaser has made application to the Company to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named, which said application has been accepted by the Company subject to the approval of the State Board of Land Commissioners, whose approval, pre-

vious to the delivery hereof, has been by its Register endorsed hereon.

That in consideration of the sum of Dollars, cash in hand paid this day by the purchaser to the Company and in consideration of the covenants and agreements hereinafter contained, it is agreed that in pursuance of the contract between the Company and the State, hereinafter called the State Contract, that the purchaser shall become entitled to shares of the capital stock of the Salmon River Canal Company, Limited, the certificate thereof to be in the form as follows, to-wit:

SALMON RIVER CANAL COMPANY, LIMITED.
 Shares., 19 . . .

This is to certify
 is the owner of shares of the capital stock of the Salmon River Canal Company, Limited.

This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

.

in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land and Water Company, based upon the number of shares

finally sold in accordance with the said contract between the said company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED.

By.....
President.

Attest:
Secretary.

Said certificate to be delivered as provided for in said State Contract and under the conditions therein stated.

The water which the purchaser shall have the right to conduct and receive through the said canal system shall be used upon and the water shall become dedicated and be appurtenant to the following described land and no other, to-wit:

.....
Section

Township.....South of Range.....

East, B. M., containing.....acres in Twin Falls County, State of Idaho.

And the parties hereto expressly agree as follows, to-wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with the laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited.

2. The Company agrees that so long as it retains control of the Salmon River Canal Company, Limited, to-wit, so long as it shall continue to vote a majority of the stock of said Company, as provided by the State Contract, that it will cause said Company to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said Salmon River Canal Company, Limited, is to have power to levy all necessary tolls, charges and assessments upon all users of water in proportion to their respective holdings of stock, whether water is used or not, and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the first day of January, 1911, and that thereafter the annual charge for maintenance shall not, during the period prescribed in the State contract, exceed the sum of 35 cents for each and every acre, to be charged against the entire acreage entered irrespective of the irrigation thereof. The purchaser agrees to pay said charges at the office of the Salmon River Canal Company, Limited, on the first day of April of each year without notice.

3. The consideration for the water rights hereby agreed to be conveyed is the sum of \$....., and the balance thereof remaining due after the cash payment hereinbefore acknowledged, to-wit, the sum of \$....., is due and payable as follows, to-wit:

	DUE	PRINCIPAL	INTEREST	AMOUNT
1st Deferred Payment.....	\$.....	\$.....	\$.....
2nd Deferred Payment.....
3rd Deferred Payment.....
4th Deferred Payment.....
5th Deferred Payment.....
6th Deferred Payment.....
7th Deferred Payment.....
8th Deferred Payment.....
9th Deferred Payment.....
10th Deferred Payment.....
11th Deferred Payment.....

Interest from.....at 6 per cent per annum shall be paid annually but if interest is not paid within thirty days from the date the same falls due then in such case it shall be computed for the entire period at the rate of eight per cent per annum.

All interest accruing prior to the date on which notice is given to the entryman that the Company is prepared to furnish water under the terms of this contract is hereby waived.

4. The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water rights, due, and may proceed either in law or equity to collect the same, and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser.

And the purchaser hereby further covenants that he will and by these presents does hereby grant, assign, transfer and set over by way of mortgage or pledge to the Company to secure the payment of the amounts due and to become due on the purchase price of the water right hereby contracted to be sold any and all interest, and all rights which he now has or

which may hereafter accrue to him under his contract with the State of Idaho, for the purchase of the lands to which the water rights hereby contracted for are dedicated, and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust with power of sale in such form as may be approved by the State Board of Land Commissioners to secure the performance by him of the provisions of this contract, which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that the shares of stock purchased in the Salmon River Canal Company, Limited, shall be and they are hereby assigned and transferred to the Company and said Company and its agents are hereby authorized and empowered to vote said stock in such manner as it or its agents may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid.

6. It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the Company or while any toll or assessment is due and unpaid from the purchaser to the Salmon River Canal Company, Limited. Water shall only be delivered through said irrigation system during the irrigation season, be-

tween April 1st and November 1st of each year. A domestic supply when necessary outside of the irrigation season shall be delivered under such rules and regulations and under such terms and conditions as shall be determined by said Salmon River Canal Company, Limited.

7. This contract may be assigned by the Company and thereupon the payment of principal and interest if so provided shall be due and payable to the assignee but the payments for tolls, assessments and charges for the delivery of water shall, unless otherwise provided, be paid to the Salmon River Canal Company, Limited, and payment thereof may be enforced by it.

8. This contract is made pursuant to and subject to the Contract between the Company and the State of Idaho and the existing laws of said State.

The entry of the above described lands is made subject to the right-of-way of the Idaho and Nevada Southern Railroad Company, provided it has filed the map of its line with the State Board of Land Commissioners prior to June 1, 1908. No charge for a water right shall be made for the land taken for the right-of-way. No compensation shall be paid the entryman for such right-of-way. The right-of-way shall not exceed one hundred feet on each side of the center line of the track.

9. All notices given to second party by the State Board of Land Commissioners or by the first party hereto or its assigns may be sent to second party by mail addressed to.....

IN WITNESS WHEREOF, The parties have hereunto subscribed their names, and the Company has caused its seal to be affixed the day and year above written in duplicate.

TWIN FALLS SALMON RIVER LAND AND WATER COMPANY,

By....., Vice President

....., Asst. Secretary

....., Purchaser

By....., Attorney in Fact

In the presence of

.....

.....

Witnesses.

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of.....,
in the year 19..., before me,.....,
a Notary Public in and for said County, personally
appeared....., known to
me to be the person whose name is subscribed to the
above instrument and acknowledged to me that he
executed the same.

Attest my hand and official seal the day and year
in this certificate first above written.

.....

(SEAL)

Notary Public.

My commission expires.....

STATE OF..... }
COUNTY OF..... } ss.

On this.....day of.....,

in the year 19..., before me,.....,
 a Notary Public in and for said County, personally
 appeared....., known to
 me to be the person whose name is subscribed to the
 above instrument as the attorney in fact of.....
and acknowledged to me that he sub-
 scribed the name of.....
 thereto as principal and his own name as attorney
 in fact.

Attest my hand and official seal the day and year
 in this certificate first above written.

.....
 (SEAL) Notary Public.

My commission expires.....

I hereby certify that the above is a true copy of
 the original contract in the above matter.

Attest:

Assistant Secretary Twin Falls Salmon River
 Land and Water Company.

The foregoing contract is hereby approved, and
 has been registered this.....day of
, 19....

STATE BOARD OF LAND COMMISSIONERS,

By, Register.

Endorsed: Filed Nov. 9th, 1914. A. L. Richard-
 son, Clerk. By E. B. Yarrington, Deputy.

(Title of Court and Cause.)

MOTION TO DISMISS.

Comes Now the defendant, the Twin Falls Salmon
 River Land and Water Company, and moves the

Court to dismiss the amended bill of complaint herein upon the following grounds:

1. That the amended bill of complaint does not state facts sufficient to entitle the complainant to any relief, there being no equity stated in the amended bill.

2. That there is a non-joinder of necessary parties complainant, in that all of the persons interested in the subject matter of the controversy and who may be interested with the complainant are not joined as plaintiffs in the action.

3. That there is a non-joinder of necessary parties, in that all of the persons adversely interested to the complainant are not made defendants.

Wherefore, said defendant prays that the amended bill of complaint herein may be dismissed.

S. H. HAYS,

Attorney for Twin Falls Salmon River Land and Water Company, residing at Boise, Idaho.

Endorsed: Filed Dec. 17, 1914. A. L. Richardson, Clerk.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Thursday, the 17th day of December, 1914.

Present: Honorable Frank S. Dietrich, Judge.
A. E. CALDWELL, et al.,

vs.

TWIN FALLS SALMON RIVER LAND & WATER COMPANY, et al.

On this day this cause came on to be heard upon the defendants' motion to dismiss said cause and after argument by the respective counsel the court ordered that said motion to dismiss be and the same is hereby denied.

(Title of Court and Cause.)

In Equity No. 494.

AMENDED ANSWER OF TWIN FALLS SALMON RIVER LAND & WATER COMPANY TO AMENDED BILL OF COMPLAINT. ALSO CROSS-BILL.

Comes now the defendant herein, the Twin Falls Salmon River Land and Water Company, a corporation, answering the amended bill of complaint herein and says:

1.

Admits the allegations contained in paragraph one of the amended bill herein.

2.

Admits the allegations contained in paragraph two of the amended bill herein.

3.

Admits the allegations contained in paragraph three of the amended bill herein.

4.

Admits the allegations contained in paragraph four of the amended bill herein.

5.

Admits the allegations contained in paragraph five of the amended bill herein.

6.

Admits the allegations contained in paragraph six of the amended bill herein.

7.

Admits that the Twin Falls Salmon River Land and Water Company made and entered into a contract with the State of Idaho, a copy of which contract is attached to and filed with the amended bill herein and marked Exhibit "A," and made a part thereof and which is referred to in the said amended bill as the State Contract, and contracted as therein specified and not otherwise.

8.

That it was understood and agreed by and between the Twin Falls Salmon River Land and Water Company and the State of Idaho, in and by said agreement, that said defendant should have the right to sell water rights or shares in the said irrigation system as provided and set forth in said contract, Exhibit "A," and not otherwise.

9.

Defendant admits that on or about the first day of June, 1908, the complainant, A. E. Caldwell, by himself or his predecessor in interest, made entry of the lands described in paragraph nine of the amended bill herein and purchased or contracted to purchase one hundred sixty (160) shares of stock in the Salmon River Canal Company, Limited, rep-

resenting the water right for said lands and that said Caldwell at said time entered into an agreement in writing for said purpose, said agreement or contract being commonly known as the Settler's Contract and being in the form Exhibit "C" attached to the amended bill herein.

10.

Defendant admits that the complainants herein, and various other settlers mentioned in the amended bill herein, on the first day of June, 1908, and at various times thereafter, made entries similar to the entry of the complainant Caldwell for various tracts of land within the limits of the irrigation project designated in Exhibits "A" and "B" referred to in the amended bill and that the said settlers or entrymen of lands under said irrigation project described in said Exhibit "A" made and entered into contracts similar in form to the contract Exhibit "C," commonly known as the Settler's Contract. That defendant does not know whether the list Exhibit "B" is correct or not, and therefore denies that said list is a correct list.

11.

Defendant admits that on or about the first day of June, 1908, and prior to the filing of the bill herein, that the defendant, the Twin Falls Salmon River Land and Water Company, entered into contracts with divers persons who made entry of lands under the said irrigation project described in said Exhibit "A" and commonly referred to as the Salmon River Segregation in the form Exhibit "C" and covering

approximately 73,000, but not 75,000 acres of land, and that the rights of the said parties holding said contracts are in accordance with said contracts and with the said contract, Exhibit "A," and not otherwise, and that said parties have no rights except such as are conferred by the said contracts, Exhibits "A" and "C."

That entrymen on approximately fifteen thousand (15,000) acres of land within said area of 73,000 acres, who had contracted and agreed in the form of the contract Exhibit "C" to purchase shares representing water rights in the said irrigation system to the extent of approximately fifteen thousand (15,000) shares have, as defendant is informed and believes, failed and neglected to settle upon, cultivate or improve their lands as required by law and for that reason the entries of land on said segregation have become void and of no force and effect and are subject to cancellation at any time and that for this reason there are not now outstanding valid settlers' contracts, as defendant is informed and believes, for more than sixty thousand (60,000) shares or water rights in the said irrigation works representing approximately 60,000 acres of land in said segregation.

12.

That it was understood, agreed and contemplated by the terms of the said State Contract, Exhibit "A," and said settler's contract, Exhibit "C," hereinbefore referred to as is stated, set forth and agreed in said contracts and not otherwise.

13.

Defendant avers that the appropriation provided for by the State Contract for the irrigation works and system referred to in the amended bill herein consists of the flow of Salmon River together with its tributaries and drainage thereof above the point of diversion and none other; that the normal flow of the stream fluctuates to a great extent and that therefore, under the terms of the Contract, Exhibit "A," it was provided that water should be stored for irrigation purposes. Defendant denies that the dam or reservoir, or either of them, lose a great deal of water by seepage or evaporation, or any amount in excess of the normal and customary amounts under such circumstances, and defendant denies the amount of water so lost is or will continue to be very great. Defendant denies that a great deal of water is lost in transportation from the dam or reservoir to the various farm units, or that any water is lost in transportation from the dam or reservoir to the various farm units in excess of the customary or usual amount under such circumstances, and denies that the same is or will continue to be very great. Defendant denies that the amount of the available supply of water for use on the several land entries referred to in the amended bill after deducting the loss mentioned in paragraph thirteen of the amended bill herein is or will be inadequate to irrigate the acreage entered upon and under water contracts sold, and denies that the said available supply of water for use on the several land entries will not

exceed 50,000 acre feet or that it cannot be determined that more than 50,000 acre feet of water will be available for the use of the water right holders under said irrigation works delivered at a distance of one-half mile from each quarter section of land under said segregation.

14.

Defendant denies that in order to comply with the provisions of the Carey Act, or to irrigate or reclaim the lands mentioned in the amended bill herein or to reclaim said land or to raise ordinary agriculture crops thereon, that at least one-half miner's inch per acre continuous flow of water throughout the entire irrigation season, or at least two and three-fourths ($2\frac{3}{4}$) acre feet of water per acre, if delivered by periods of rotation as the needs of the crops demand (said amount of water to be delivered within one-half mile of the respective land entries), is or will continue to be necessary, and defendant denies that a less amount or any less amount will be wholly or at all insufficient to raise ordinary agricultural crops, or that a less amount will not enable the complainants and settlers upon said tract to comply with the Carey Act regarding a permanent water supply to reclaim said land or enable them to farm or cultivate their land profitably and defendant denies that unless the complainants and all settlers upon said Salmon Tract are able to secure the amount of water claimed in paragraph fourteen of the amended bill for their land that a great deal or any of such land will remain idle or unproductive or

that the owners or holders thereof will suffer great or irreparable injury or damage or any injury or damage whatever.

15.

Defendant avers that it was provided for and contemplated by the said State Contract, Exhibit "A," and the said Settler's contract, Exhibit "C," that water should be furnished and delivered in accordance with the terms of said contracts and not otherwise, or that it should be delivered at any place other than that specified in the said contract, or that it should be delivered in any amount, time or manner except in accordance with an efficient administration of the water supply and a skillful use thereof by the farmer, or in any manner other than to enable the farmer to raise the crops suitable to the existing conditions, and defendant denies that it was provided or contemplated by the said State Contract and the Settler's Contract that the water right purchased by the complainants and other settlers on said tract per share or acre was or would be a right to receive one one-hundredth of a cubic foot of water per acre per second of time equal to one-half miner's inch for each acre of land irrigated by a continuous flow during an entire irrigation season extending from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time and defendant denies that the irrigation season extends from the first day of April to the first day of November of each year but alleges that the irrigation season fluctuates from

year to year, and defendant avers that the State Contract, Exhibit "A," was made and entered into after an investigation and examination by the State Engineer of the State of Idaho of the water supply available for the irrigation of the lands described in Exhibit "A"; that the State Engineer of the State of Idaho made report to the State Board of Land Commissioners of said State in pursuance of law that the water supply was sufficient for the irrigation of the said lands described in said Exhibit "A" and which were thrown open for entry and that after said report by the said State Engineer, the State Board of Land Commissioners of the State of Idaho made and entered into said Contract, Exhibit "A."

16.

Defendant denies that at or prior to the time of the making of the settler's contract herein, it was represented to complainants or to other purchasers of water rights or shares in said irrigation system by this defendant that ample water was available to supply the rights of these complainants and all of the settlers on said system or that any representations whatever were made other than as appear in said contracts Exhibits "A" and "C," and denies that the complainants or a large number of settlers on said tract relied upon any representations, made by this defendant and that relying upon such representations cleared their lands or a large portion thereof and have planted such land with crops which are now growing upon said land.

17.

Defendant denies that it has failed or neglected or refused or that it still fails or neglects or refuses to comply with the terms or conditions of the State Contract hereinbefore referred to in any respect whatever either as set up in paragraph seventeen of the amended bill herein or otherwise, and denies that it has or that it still fails, neglects or refuses to so construct its irrigation system as to make water available in ample or sufficient quantities to furnish complainants or other settlers upon said tract with the water necessary for the reclamation of their lands as provided in said contracts and defendant denies that in violation of its contract or otherwise with the State of Idaho, herein referred to as the State Contract, that it sold a large or any number of water contracts or shares in the said irrigation system described in said Exhibit "A," by the terms of which it undertook to furnish to such water-contract holders a great or any amount of water in excess of the appropriation of water made by the defendant or assigned to it and referred to in said State Contract, and defendant denies that it has sold or delivered a large or any amount of water from its reservoir system to persons or corporations other than actual settlers or contract holders upon said segregation and denies that it has sold or delivered, or that it still sells or delivers from the irrigation and reservoir system mentioned in the amended bill herein a large or any amount of water to persons or corporations other than settlers upon said Salmon River Tract mentioned in the amended bill herein.

Defendant further avers that as it is advised and believes, the Salmon River Canal Company, Limited, loaned a certain amount of water not to exceed 1,000 acre feet to persons who obtained an order or request therefor from stockholders of said company during a short time in the season of 1914, which water was later to be returned, but that this defendant has no intention or purpose of selling or disposing of any waters other than to persons holding contracts in the form Exhibit "C."

18.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract, Exhibit "C," herein referred to in any respect or at all, or that it has failed or neglected or refused to supply an ample or sufficient supply of water to the complainants or either or any of them, or to any of the other settlers upon said tract, or to either or any of them, or that it has failed or neglected or refused to supply an amount of water in excess of about three-fourths of an acre foot per acre, and defendant denies that approximately three-fourths of an acre foot of water per acre is the only amount now or heretofore available for the use of all of the land under said segregation. Defendant further avers that the only source of water supply for the said tract is the said Salmon River and its tributaries above the point of diversion of the dam described in said Exhibit "A."

19.

That defendant has no knowledge, information or belief concerning the matters set up in paragraph nineteen of the amended bill herein and therefore denies each and every of the allegations therein contained, and defendant further denies that the said State Board of Land Commissioners were either justified by any facts or authorized by any law to take the action or any of the actions demanded by the complainants herein in paragraph nineteen of the amended bill herein or that the said State Board of Land Commissioners had any right or authority to bring any action in court in regard to any of the said matters in said paragraph of said amended bill and denies that the said State Board of Land Commissioners had any right, power or authority to require the defendant herein to procure the additional supply of water for the irrigation works mentioned in the complaint or to reduce the acreage of land mentioned or to cancel, or annul any of the contracts already entered into between the settlers and the defendant herein. Defendant admits that said Land Board has the power and that it is its duty to cancel entries of land under said system in case of a failure to comply with the law as to residence or cultivation.

20.

Defendant denies that the Department of the Interior is now or at any time has withheld its decision for the issuance of the patents for lands under said irrigation works pending proof that said land had been reclaimed within the contemplation of the pro-

visions of the Carey Act, or that it has heretofore notified the State Land Board of the State of Idaho that the acreage in said segregation must be reduced because of the insufficiency of the water.

21.

Defendant denies that an additional water supply is necessary to be supplied to the said segregation so as to furnish each acre with the amount of water necessary for the irrigation thereof and denies that if additional water is not furnished, or if water contracts be not canceled and the acreage of said segregation reduced, that the complainants or either or any of them, or other contract holders, or either or any of them, will suffer great or irreparable injury or any injury whatever and defendant denies that if the contract holder entitled to receive water is furnished only the proportionate amount of water now available that the entire or any portion of the segregation will be spotted with uncultivated areas, or any uncultivated areas whatever, or that there will be areas not properly cultivated because of an insufficient water supply.

22.

Defendant denies that the balance due under and by virtue of the terms and conditions of the State Contract and the Settler's Contracts and because of any failure on the part of the defendant to comply with the terms or conditions of said State Contract, and the said Settler's Contract that the balance due from the complainants or either or any of them, or from the settlers on the tract, or either or any of

them, was intended to be or should be or does constitute a trust fund for the purpose of carrying out the terms or conditions of the State Contract, or the Settler's Contracts for the purpose of the Carey Act, or particularly to supply entrymen and contract holders with a supply of water in a substantial ditch as claimed in the amended bill herein. Defendant admits that there is now due from the complainants and from the contract holders under said project as it now exists a sum equal to and in excess of about thirty-seven (\$37.00) dollars per acre or a total of about two million seven hundred seventy-five thousand dollars (\$2,775,000.00).

23.

Defendant denies that since it has notified settlers under its system that water was available for delivery that it has through the defendant, the Salmon River Canal Company, Limited, collected large sums of money from water-contract holders including the complainants, ostensibly for maintenance charges but that in reality such sums and a great portion thereof, were used in the payment of excessive and illegal salaries and expenses of the officers, employees or attorneys of this defendant and denies that this defendant through the Salmon River Canal Company, Limited, at the times or in the manner stated in paragraph twenty-three of the amended bill herein collected such maintenance charges from all water-contract holders upon said segregation although only a portion of the water contracted to be delivered was in fact delivered; denies that this defendant fraudu-

lently or otherwise applied such maintenance charges so collected as stated in the amended bill herein in paying either excessive or illegal salaries of employees or attorneys, or paying exorbitant rent for buildings or in the purchase of equipment for its own use or benefit or for the use or benefit of its kindred projects or any of them and not for the use and benefit of said Salmon River Canal Company, Limited, and defendant further avers that all maintenance charges and assessments, as it is informed and believes, that had been made by the Salmon River Canal Company, Limited, have been charged only against such persons as were legally liable therefor and only in proper amounts, and that only proper payments were made out of said fund.

24.

Defendant denies that the Twin Falls Salmon River Land and Water Company is insolvent or unable to respond in damages to the complainants or other holders of contracts on said tract and denies that unless the several or total amounts due from complainants or other contract holders be treated as a trust fund to carry out the terms and conditions of the said State Contract and the Settler's Contract, that the complainants or any of them or all contract holders, or any of them under said segregation, will be without adequate remedy, or will suffer great or irreparable loss or injury, or that said irrigation system will be a failure or that said segregation and no part thereof will be entitled to patent from the United States.

25.

Defendant avers that no additional supply of water is necessary to irrigate the lands now entered upon said segregation or for which water contracts have been issued and deny that said irrigation project cannot be made a success unless a tract of land not to exceed 30,000 acres in extent be set apart as land subject to water rights and that all other lands on said segregation be released and declared to be without a water right thereon.

26.

Defendant avers that the rights of the settlers and water-contract holders under said irrigation project are for a proportionate interest in the said water rights and irrigation works described in Exhibit "A," and that all contract holders are entitled to a proportionate part of the water supply and a proportionate part in the irrigation works and the rights appurtenant thereto, and defendant denies that unless the relative rights of the entrymen are fixed by an order or decree of the court that the amount of the acreage under cultivation will be so great that water will not be sufficient to irrigate the same but only a small portion thereof and denies that great confusion, trouble or injury will result to all or any persons holding water rights in said system, or that a multiplicity of suits prosecuted by such persons so interested will follow. Defendant further avers that under the terms of the Contract, Exhibit "A," that the said irrigation system, as fast as the same was completed for operation, was to be turned

over to the Salmon River Canal Company, Limited. That the same was completed for operation; that the certificate of the Chief Engineer of the Salmon River Canal Company, Limited, was made as provided by Exhibit "A" and that the same was presented to the State Engineer of the State of Idaho, who approved the same, and transmitted the same to the State Board of Land Commissioners, but that no order has ever been made by the State Board of Land Commissioners of the State of Idaho turning over the said system or any portion thereof for operation to the Salmon River Canal Company, Limited, although said Salmon River Canal Company, Limited, was properly entitled to have said system turned over for such purpose; that in actual practice, said Salmon River Canal Company, Limited, has taken possession and control of the said system and operated the same.

27.

Defendant avers that the Salmon River Canal Company, Limited, is in control of said irrigation system in the manner and under the conditions above set forth but denies that the same is under the dominion of the defendant, the Twin Falls Salmon River Land & Water Company, or that the Twin Falls Salmon River Land & Water Company has any power or authority over said Salmon River Canal Company, Limited, except as may arise from the conditions of the contracts Exhibits "A" and "C"; that the length of time that the Twin Falls Salmon River Land & Water Company will continue to vote the stock in the

Salmon River Canal Company, Limited, of the various plaintiffs and other settlers upon said irrigation project depends entirely upon the promptness with which the payments are made upon the water contracts known as the Settlers' Contracts, Exhibit "C"; that the votes electing the present Board of Directors of the Salmon River Canal Company, Limited, were cast chiefly by the Twin Falls Salmon River Land and Water Company under the authority given in the contracts Exhibits "A" and "C," and defendant denies that all of the officers of the Salmon River Canal Company, Limited, are the agents of this defendant, and defendant denies that the interests of all of the settlers on the Salmon River Tract, or the owners or holders of contracts in said irrigation works are adverse except in this case to the interest of this defendant and defendant denies that it has refused or that it still refuses to take any steps to protect the interests of the Salmon River Canal Company, Limited, in the matters set forth in the amended bill herein, or that it has in any manner been requested to take any steps whatever in this matter and further denies that the Salmon River Canal Company, Limited, has in any manner been requested to take any action with regard to any of the matters set forth in the bill herein or to bring any suit thereon, and defendant denies that the complainants are compelled to institute this action not only in their own behalf but in the behalf of and for the benefit of all settlers and water-contract holders on said tract, or for the benefit of the Salmon River Canal Company, Limited, and defend-

ant denies that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action.

28.

Defendant avers that the Salmon River Canal Company, Limited, controls the distribution of water in the irrigation works herein referred to to the consumers and that the Twin Falls Salmon River Land and Water Company does not control such distribution and defendant denies that it or the Salmon River Canal Company, Limited, have refused or still refuses to supply complainants or any of them, or other contract-holders or any of them upon said tract the water as contemplated or constructed or provided in the State Contract, and the Settler's Contract Exhibits "A" and "C," or that this defendant or the said Salmon River Canal Company, Limited, have fraudulently pretended that the water heretofore supplied is ample for the acreage entered and defendant denies that it or the Salmon River Canal Company, Limited, have refused to deliver water in the quantities contemplated by the said contracts Exhibit "A" and "C" as required thereby and denies that in fact this defendant or the said Salmon River Canal Company, Limited, delivered water to such settlers or any settlers, including the complainants, or any of them, in a very much less amount; denies that unless this court during the pendency of this action appoints a receiver or receivers, or takes possession of said irrigation works or operates the same for the benefit of those entitled to water therefrom, that this defendant will

continue to oppress these complainants or any of them, or the settlers on said tract or any of them, and denies that any acts of this defendant will result in the multiplicity of suits; denies that this defendant or the Salmon River Canal Company, Limited, have refused or still refuse to adopt a reasonable or proper system of delivery of water, or one required by the conditions of the crops or that they or either of them have refused or still refuse or that they will continue to refuse to recognize the rights of the complainants and other settlers upon said tract, or either or any of them, but allege that the said water will be furnished and delivered according to the best methods of practice and in pursuance of the contracts Exhibit "A" and "C" and defendant denies that it or the Salmon River Canal Company, Limited, have not delivered or will not deliver an ample supply of water during any period of delivery or as the needs of the crops require, and defendant denies that the results of its methods or system of delivery has been to cause hardship or annoyance or loss of crops, and denies that to continue its method of water delivery will produce great or any loss or damage, or numerous claims for off-sets and reimbursements from the several amounts due from settlers or that it will greatly affect the funds so due or the collection thereof and defendant denies that the collection of the funds due from the settlers cannot be effectually accomplished without the aid of a receiver or without the appointment of a receiver for the operation of the irrigation works.

29.

Defendant admits that prior to the first day of June, 1908, and prior to the time of the making of any land entries by any settler upon said Salmon Tract that it executed a deed of trust to the defendant, the American Trust & Savings Bank, Trustee, as set forth in the answer of the said trustee filed herein and defendant alleges that said trust deed did create a valid lien upon all of the property therein described and defendant admits that it assigned to the said trustee a larger portion of the water contracts made with settlers upon said tract.

30.

Defendant admits the allegations contained in paragraph thirty of the amended bill.

31.

Defendant denies that it has failed or neglected or refused to comply with the terms or conditions of the said State Contract, Exhibit "A," or the Settler's Contract in the form Exhibit "C," or that it has failed, or neglected or refused, or that it still fails, neglects or refuses to complete its irrigation system in any respect or at all so as to comply with the terms and conditions of the said contracts, Exhibits "A" and "C," or to furnish or make available the water required by it to be furnished to the contract holders in accordance with the terms or conditions of the said State Contract and said Settlers' Contracts, Exhibits "A" and "C" and denies that the pretended lien of the trust deed is subject or subordinate to the rights

of the purchasers of shares or water rights in said irrigation system but alleges the said deed of trust was taken subject to and in pursuance of the said Contract Exhibit "A," which contract authorized the making thereof and denies that said trust deed is null or void or of no effect as against the complainants, or any of them, or against the other water-contract holders in said irrigation system, or any of them.

32.

Defendant admits the making of the assignment mentioned in paragraph thirty-two of the amended bill and alleges that the same is regular and valid and not pretended.

33.

Defendant denies that the said assignment referred to in the amended bill in paragraphs thirty-two and thirty-three thereof was made without a valuable consideration.

34.

Defendant denies that the questions sought to be determined in this action are of common or general interest to all settlers upon said Salmon Tract, or to all water-contract holders thereon and denies that they constitute a class so numerous as to make it impracticable to bring them all before the court.

35.

Defendant denies that the complainants or any of them, or the other settlers upon said Salmon Tract, or any of them, have not a plain, speedy or adequate

remedy at law, or that they will suffer great or irreparable wrong or injury unless the court grants the relief prayed for.

And further answering, defendant says that the amount of water claimed as necessary in the amended bill herein for the use of the plaintiffs and others upon said tract is an amount in excess of that required for beneficial use and that the use of the amount of water as set forth as being demanded in the amended bill herein upon the lands described in said bill would be injurious to said lands and would result in the depreciation of the security afforded by the water contracts commonly called the settlers' contracts in the form Exhibit "C," and would impair the security covered by the lien granted under the statute to the Twin Falls Salmon River Land and Water Company herein.

36.

CROSS-BILL.

And the Twin Falls Salmon River Land and Water Company, by way of cross-bill herein against the plaintiffs above mentioned and all in whose behalf they may be acting, and also by way of counter-claim and further answer, avers as follows:

That on account of the soil and physical conditions existing upon said Salmon tract and upon the lands to the north thereof which are likely to receive the drainage therefrom, that it is absolutely essential for the best interests of the said Salmon River Tract and of all of the settlers thereon, that

very great care should be used in the application of water to said lands for irrigation purposes and also in regard to the amount thereof which is applied for said purpose, and if great care is not used in the irrigation of said lands, that a large area thereof will become valueless and the security afforded by the water contracts hereinbefore mentioned will become lost and that large numbers of suits will be brought by persons upon adjoining tracts for injury to lands done by reason of waste and seepage waters from the Salmon tract.

That it is necessary for the settlers upon said tract to use great skill in the application of water to their said lands and for the Salmon River Canal Company and the Twin Falls Salmon River Land and Water Company to cause only so much water as may be necessarily required for the irrigation of crops to be run into said canals described in the contract Exhibit "A."

That the application of the amount of water demanded by the plaintiffs in the amended bill herein and the manner of use desired and demanded therein would result in great damage and injury to a large portion of the lands on the said Salmon tract and in the destruction of the security afforded to the Twin Falls Salmon River Land & Water Company and its successors in interest under the terms of the water contract, Exhibit "C."

That under the terms of the contract, Exhibit "A" (Par. X of said contract), attached to the amended bill herein, it is the duty of the Twin Falls Salmon

River Land and Water Company, while it shall retain control of the said Salmon River Canal Company, as specified in said contract, Exhibit "A," to cause water to be measured to users from the place of diversion at the main laterals of the irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.

That the use of a rotation system is necessary in the distribution of the water to settlers on said tract in order that the minimum amount of injury may be done to the lands irrigated from said canal system and in order that the security represented by the water contracts mentioned in the amended bill herein may not be impaired and also for the purpose of most equitably and efficiently distributing the water supply in order that effective use may be made thereof by all of the settlers upon said tract and in order that an unnecessary amount of water may not be used.

That the plaintiffs herein are members and officers of a settlers' association, being a voluntary association organized by a portion of the settlers on said project and that the said settlers' association and the plaintiffs in the amended bill herein, the officers thereof, have joined together and conspired to prevent the use of a rotation system in the

use of water and to prevent the use of water on said tract under proper and suitable rules and regulations in accordance with the terms of the said contract, Exhibit "A," and to prevent the proper and suitable distribution of the water supply under suitable rules and regulations now in use and those which will hereafter be made, and that they will continue to so join together and conspire and to bring numerous and vexatious suits in regard to said matter unless restrained by the order of this court; that the plaintiffs herein are acting for themselves and for other persons members of the said water users' association; that the joining together and conspiring and bringing of the suits above mentioned are adverse to the interests of the settlers and water users on said tract not members of the settlers' association; that it is the duty of the Twin Falls Salmon River Land and Water Company and of the Salmon River Canal Company, Limited, to handle and distribute the water supply in such manner as will best protect and serve the interests of all the users of water from the canal system and that this cannot be done unless the rules and regulations prescribed by the Twin Falls Salmon River Land & Water Company and the Salmon River Canal Company are complied with and unless a proper and suitable system of the distribution of water by rotation is maintained.

That unless said rules and regulations are reserved and said system of rotation maintained, it will be impossible to distribute the water supply to the irrigators upon said tract in such manner as will

best protect and serve the interests of all of the users of water from said canal system and the security represented by the contracts made in the form, Exhibit "C," will be greatly impaired and in part destroyed.

Wherefore, The Twin Falls Salmon River Land and Water Company prays that the amended bill of the plaintiff herein may be dismissed and that the plaintiffs herein and all members of the Settlers' Association, of which said plaintiffs are members and officers, be enjoined and restrained from bringing any suits or in any manner interfering with the delivery and distribution of the water supply through the irrigation system herein mentioned, according to the rules and regulations established therefor and in accordance with the rotation system and said Twin Falls Salmon River Land and Water Company prays that all proper relief may be granted herein.

S. H. HAYS,

Attorney for Defendant,

Residing at Boise, Idaho.

Duly verified. Endorsed: Filed March 29, 1915.
A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

In Equity No. 494.

ANSWER OF SALMON RIVER CANAL COMPANY, LIMITED, TO AMENDED BILL OF COMPLAINT.

Comes now the defendant, the Salmon River Canal Company, Limited, for answer herein and says:

1.

Admits the allegations contained in paragraphs one, two, three, four, five, six and seven of the amended bill herein, and admits that Exhibit "A" is a copy of the contract under the terms of which this defendant was organized.

2.

That shares of stock of this corporation amounting to about 73,000 shares representing water contracts for about 73,000 acres have been contracted for by various persons who made entry of land upon said Salmon tract mentioned in the amended bill herein; that this defendant is unable to say whether Exhibit "B" contains a list of all of the names of the holders of settlers' contracts or whether all of the persons named therein were or are holders of such settler's contract either as original entrymen or by assignment or conveyance, and therefore denies that said list is a true and correct list of the persons holding water contract or having an interest in this controversy.

3.

That this defendant has no interest in the matter in controversy herein other than as an operating company under the terms of the said contract, Exhibit "A," and said Settler's contract, Exhibit "C."

4.

Defendant denies that it has collected large sums of money from water-contract holders under the said irrigation system including the complainants osten-

sibly for the purpose of maintenance charges but that in reality such sums were used in payment of excessive or illegal salaries or expenses of the officers or the employees or attorneys of the defendant, the Twin Falls Salmon River Land and Water Company, and denies that it has collected such alleged maintenance charges from all water-contract holders upon said Salmon tract, although a portion only of the water contracted to be delivered was in fact delivered and defendant denies that it has levied any maintenance assessment or other charge improperly, or that the funds so collected have been improperly used or applied, or that they have been applied for the use or benefit of any other person or corporation.

5.

Defendant admits that it has been in the actual control and operation of the system of irrigation works described in the amended bill herein as set forth in the answer of the Twin Falls Salmon River Land and Water Company.

Defendant further alleges that it is in the actual control of the said irrigation system; that its officers are elected by its stockholders, and admits that a large portion of its stock is voted by the representatives of the Twin Falls Salmon River Land & Water Company as provided in the contracts, Exhibits "A" and "C;" that the length of time during which said company will vote said stock depends upon the speed with which payments are made, as is more fully shown in said contracts, and defendant denies that its officers are the agents of the Twin Falls Salmon

River Land & Water Company, and denies that the interests of the complainants or any of the, or of the settlers, or any of them, on the said Salmon tract, or the holders of water contracts thereon, are adverse to the interests of the Salmon River Canal Company, Limited, and defendant denies that the complainants are compelled to institute this action not only in their own behalf and for their own benefit but in behalf of and for the benefit of all of the settlers or water-contract holders on said tract, or for the benefit of this defendant, and defendant denies that by reason of the premises or otherwise that it would be useless to demand or ask the defendant, the Salmon River Canal Company, Limited, to institute or prosecute this action, but, on the contrary, this defendant avers and alleges that it is desirous of doing those things in all of the matters affecting its stockholders which the majority of its stockholders desire; that, as it is informed and believes, about one-third of its stockholders were desirous of adjusting such differences as they may have with the Twin Falls Salmon River Land & Water Company by means of arbitration; that about one-third of its stockholders were opposed to arbitration and that the remaining one-third thereof were non-committal with regard to whether or not there was any controversy to be settled or as to the manner in which it should be settled; that no request has ever been made of the Salmon River Canal Company, Limited, to bring any action whatever with regard to the matters in controversy herein.

6.

Denies that this defendant has refused or still refuses to supply complainants, or any of them, or other contract holders, or any of them, with water as contemplated by the contracts, Exhibits "A" and "C," or that this defendant fraudulently pretends that the water heretofore supplied is ample for the acreage entered or that this defendant has refused to deliver water in the quantities contemplated and as required by the contracts, Exhibits "A" and "B," and denies that water has been delivered to the settlers in a very much less amount or in any less amount than that provided in the said contracts, and defendant denies that unless the court appoints a receiver or receivers herein and takes possession of the said irrigation works and operates the same that a multiplicity of suits will result or that any acts of oppression will be committed or that any such acts have been committed by this defendant, and denies that this defendant has refused or still refuses to adopt a proper system of delivery of water or one required by the condition of the crops, or that it has refused or still refuses or that it will continue to refuse to recognize the rights of the complainants or any of them, or of the other settlers upon said tract, or any of them, or deny to them or any of them the right to receive the amount of water to which they are entitled under the said contracts; defendant denies that it has not delivered or that it will not deliver an ample supply of water during the periods of delivery or as the needs of the crops require; de-

nies that the results of its methods and system of delivery have been to cause hardship, annoyance or loss of crops; denies that to continue the same will produce great loss or damage or numerous claims for set-offs or reimbursements from the amounts due from settlers, and defendant further says that on account of the character of the soil and physical conditions existing upon said Salmon tract that it is absolutely necessary to use great care in the amount of water delivered and used for irrigation purposes thereon, and that if great care is not used, that a large amount of the lands upon said tract will become valueless and that adjoining lands now owned and settled upon by persons who are not contract holders on the Salmon River tract will be in danger of injury and that it is therefore necessary for this defendant in the delivery of water on the said Salmon River tract to adapt said delivery to the conditions of the soil, the general physical conditions upon said tract and to the climate and general condition surrounding the growing of crops on said project; that it would be impossible to deliver water to the water-contract holders upon said project in the manner and to the extent demanded by the complainants herein without great injury resulting to the lands upon said tract and the probable injury to lands upon adjoining tracts.

That, as heretofore stated, this defendant has no interest in the matter in controversy herein except such incidental interest as it may have as an operating company in charge of the irrigation works men-

tioned in the amended bill; that it is not a corporation organized for profit but only for the operation of said works; that as such corporation it is its duty to safeguard the water supply for said project and to see that injury does not occur to the lands on said Salmon tract or to the adjoining lands by reason of the use of the water supply in its charge. That it desires to pursue such course in any matters which are in controversy with the Twin Falls Salmon River Land & Water Company herein as may be required or desired by a majority of its stockholders; that it never has refused and does not intend to refuse to follow or carry out the wishes and desires of its stockholders.

Wherefore, Defendant prays that it may be hence dismissed and that it may have such relief herein as to the court may seem meet and equitable.

P. B. CARTER,

Solicitor for Defendant, Salmon River Canal Company, Ltd.

Duly verified. Endorsed: Filed March 29, 1915.
A. L. Richardson, Clerk. By Pearl E. Zanger,
Deputy.

(Title of Court and Cause.)

ANSWER OF COMMONWEALTH TRUST COMPANY OF PITTSBURGH, TRUSTEE.

Now Comes the Commonwealth Trust Company of Pittsburgh, Trustee, and saving and reserving to itself all manner of benefit or advantage of exception

that can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant had demurred thereto, for answer to said amended bill or to such parts thereof as this defendant is advised it is necessary or material for it to make answer thereto, answering says:

I.

This defendant is not advised save by the allegations of said amended bill of complaint, and is without knowledge as to the citizenship or residence of any of the parties plaintiff to said suit, and it therefore leaves the complainants to make such proof thereof as they may be advised is material or as they may be able to produce, but this defendant admits that the said Twin Falls Salmon River Land & Water Company is a corporation organized under the laws of the State of Delaware and is a citizen of said State, and that the Salmon River Canal Company, Limited, is a corporation organized under the laws of the State of Idaho and is a citizen of said State; that the said John M. Haines, W. L. Gifford, Grace Sheperd, Joseph H. Peterson and Fred L. Huston are officials of the State of Idaho as alleged in paragraph IV of said amended bill of complaint and constitute the State Board of Land Commissioners of said State; that this defendant, the Commonwealth Trust Company of Pittsburgh, is a corporation organized under the laws of the State of Pennsylvania and a citizen of said State with its principal office in the City of Pittsburgh, and that the defendant

A. C. Robinson is a citizen and resident of said State of Pennsylvania residing in the City of Pittsburgh, said State.

II.

This defendant admits that on or about the 30th day of April, A. D. 1908, the defendant, Twin Falls Salmon River Land & Water Company, made and entered into a contract with the State of Idaho, the latter acting by and through its State Board of Land Commissioners; admits that said contract was entered into under the terms of the Act of Congress commonly known as the Carey Act, approved August 18th, 1894, and certain other acts of Congress amendatory thereof or supplemental thereto, and the laws of the State of Idaho accepting the terms of said acts of Congress, made in furtherance thereof and for the purpose of carrying out the terms, provisions and conditions of said Acts of Congress; admits that said contract contemplated and provided for the construction of an irrigation system consisting of a storage reservoir in Twin Falls County, said State, for conserving and storing the waters of the Salmon River and for the purpose of diverting and carrying said water so stored and conserved to the lands to be reclaimed therefrom; and this answering defendant is not fully advised as to the terms of said contract and is without knowledge whether the contents thereof are correctly stated in paragraph VI of the amended bill of complaint herein, and it, therefore, prays that complainants be required to make strict proof of the terms and provisions of said contract of April 30th, 1908.

III.

This defendant is without knowledge as to the facts alleged in paragraph VIII of said amended bill of complaint, and it therefore prays that the complainants be required to make strict proof of each and every allegation contained in said paragraph VIII of the said amended bill herein.

IV.

This defendant is not advised, save by the allegations of said amended bill, as to whether on or about the 1st day of June, 1908, the complainant A. E. Caldwell by himself or his predecessor in interest, made entry with the State Board of Land Commissioners for the lands described in paragraph IX of said amended bill, or as to whether said complainant or his predecessor in interest purchased water rights or entered into a contract or contracts as alleged in said paragraph IX, and this defendant, being without knowledge as to said facts, leaves the complainants to make such proof thereof as they may be advised is material and as they may be able to produce.

V.

This defendant is not advised, save by said amended bill of complaint, whether the said complainants or any of them or various other settlers on the tract of land in said amended bill referred to, made entries by themselves or their predecessors in interest for tracts of land under what is referred to as the Salmon River Segregation in said amended bill, or as to whether such entries are fully described in complainants' Exhibit "B," referred to in said amended

bill, and this defendant, being without knowledge as to the allegations contained in paragraph X of said amended bill, prays that complainants may be required to make strict proof of each and every of said allegations.

VI.

This answering defendant is not advised, save by said amended bill of complaint, whether the Twin Falls Salmon River Land & Water Company on or about the 1st day of June, 1908, or at any other time, sold to persons who held entries or owned land on said Salmon River Segregation, about seventy-five thousand shares or water rights in the irrigation works referred to in said amended bill, and being without knowledge as to the matters set forth in said paragraph XI in said amended bill, this answering defendant prays that complainants may be required to make strict proof of each and every allegation contained in said paragraph XI.

VII.

This defendant is not advised, save by said amended bill, as to what was understood or agreed or contemplated by the terms of the contract referred to in said amended bill as the State Contract, and being without knowledge as to said matters and each of the allegations contained in said paragraph XII of said amended bill, this defendant prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XII; but this defendant, upon its information and belief, denies that under or by the terms or conditions of what is

referred to in said amended bill as the Settlers' Contracts, the owners of shares or water rights in said irrigation system are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for the irrigation of the lands described in their respective contracts, but on the contrary, this defendant alleges on its information and belief, that such water was to be delivered in turn or by rotation at such times and in such quantities as said Twin Falls Salmon River Land & Water Company or said Salmon River Canal Company, Limited, should deem necessary or proper.

VIII.

This defendant is not advised, save by said amended bill, as to the water supply of said irrigation system or as to the flow of said Salmon River, or as to any of the facts alleged or set forth in paragraph XIII of said amended bill, and being without knowledge as to the facts set forth in said paragraph XIII, it prays that complainants may be required to make strict proof of each and every of the allegations contained in said paragraph.

IX.

This defendant is not advised, save by said amended bill, as to whether the lands of complainants and others on said Salmon River tract are dry and arid in character and will not produce crops except by irrigation, and as to the amount of water that may be required per acre, and as to whether such water must be furnished in continuous flow or by periods of rotation, and as to any of the other facts set forth

in paragraph XIV of said amended bill, and being without knowledge as to such facts or any of them, prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XIV.

X.

This defendant is not advised, save by said amended bill, whether it was provided for or contemplated by the State contract or what is referred to in said amended bill as the Settlers' Contracts, that an ample supply of water was and would be provided and actually furnished through said irrigation works as alleged in paragraph XV of said amended bill, and being without knowledge as to said allegations and as to any of the other allegations contained in said paragraph XV except as herein otherwise expressly admitted or denied, this defendant prays that complainants be required to make strict proof of each and every allegation contained in paragraph XV of said amended bill; but this defendant, upon its information and belief, denies that complainants or other settlers upon said tract, or any of them, are entitled to receive one-hundredth (1-100) of a cubic foot of water per acre per second of time for each water right or share purchased, either by continuous flow or during the irrigation season from April 1st to November 1st of each year, or an equal or proportionate amount if delivered by rotation or by periods of time.

XI.

This defendant is not advised, save by said amend-

ed bill, as to any of the facts set forth in paragraph XVI of said amended bill, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraph XVI.

XII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XVII of said amended bill, and being without knowledge as to said facts or any of them, prays that complainants be required to make strict proof of each and every allegation or the facts set forth in said paragraph XVII.

XIII.

This defendant is not advised, save by said amended bill, as to any of the facts set forth or allegations contained in paragraphs XVIII, XIX, XX and XXI of said amended bill, and being without knowledge as to the facts contained in said paragraphs, and each and every of them, this defendant prays that complainants be required to make strict proof of the allegations contained in said paragraphs XVIII, XIX, XX and XXI.

XIV.

This defendant denies that under or by virtue of the terms and conditions of what is referred to in said amended bill of complaint as the State Contract or the Settlers' Contracts, or because of the failure of the defendant Twin Falls Salmon River Land & Water Company to comply with the terms or condi-

tions of said State Contract or the Settlers' Contracts the balance due from the complainants or other settlers on said tract or the purchasers of water rights was intended to be or to constitute a trust fund for the purpose of carrying out the terms or any of the terms or conditions of either the said State Contract of the said Settlers' Contracts, or any of them, or the purposes of the said Act known as the Carey Act, or to supply the entrymen or contract holders with an ample or sufficient supply or any supply of water in a substantial or other ditch; but, on the contrary, this defendant alleges that the amount due under said water contracts or settlers' contracts is due and payable to the owners or holders of said contracts. This defendant is not advised, save by said amended bill of complaint, as to the amount due under said Settlers' Contracts, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as that may be able to produce.

XV.

This defendant is not advised, save by said amended bill, as to any of the facts set forth in paragraph XXIII of said amended bill, and being without knowledge as to said matters, this defendant therefore leaves the complainants to make such proof of the facts contained in said paragraph XXIII as they may be advised is material or as they may be able to produce.

XVI.

This defendant is not advised, save by said amend-

ed bill, as to whether said Twin Falls Salmon River Land & Water Company is insolvent or unable to respond in damages to complainants and other holders of contracts on said Salmon tract, and it, therefore, leaves complainants to make such proof thereof as they may be advised is material or as they may be able to produce. But defendant denies that unless the amount due from complainants and other holders be treated as a trust fund to carry out the terms and conditions of such State Contract and the said Settlers' Contracts, complainants, or any of them, or the other contract holders or any of them on said project will be without adequate remedy or will suffer great or irreparable loss or injury, or that said irrigation system will be a total failure or that patent will not issue from the United States to the State of Idaho or the persons entitled thereto for lands embraced in said segregation.

XVII.

This defendant is not advised, save by said amended bill, as to whether it is either necessary or feasible to secure an additional supply of water for the lands embraced in said segregation, and being without knowledge as to said facts, it prays that complainants be required to make strict proof thereof; but this defendant denies that said irrigation project can not be made a success unless the irrigable area in said tract be reduced to thirty thousand acres, or to any other area less than the amount for which water rights have been sold; denies that any of the lands under said segregation should be released or

declared without water right therein, and upon its information and belief, alleges that the Court is without authority, power or jurisdiction to cancel any of the contracts for the sale of water rights under said Salmon River project or to reduce the acreage entitled to water from said irrigation system.

XIX.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXVI and XXVII of said amended bill relative to the control of the Salmon River Canal Company, Limited, by the said Twin Falls Salmon River Land & Water Company, or as to any of the facts set forth in said paragraphs XXVI and XXVII, and being without knowledge as to said facts or any of them, it prays that complainants be required to make strict proof of each and every allegation contained in said paragraphs XXVI and XXVII.

XX.

The defendant is not advised, save by said amended bill, as to whether either the said Twin Falls Salmon River Land & Water Company or the said Salmon River Canal Company, Limited, have failed or refused to supply complainants or other contract holders under said irrigation system with water as contemplated by the State Contract or the Settlers' Contracts, or have failed to furnish or supply persons entitled to water from said irrigation system to the amount of water to which they may be entitled as alleged in paragraph XXVIII of said amended bill, and being without knowledge as to

such facts, it prays that the complainants be required to make strict proof of each and every of said allegations. And defendant, on its information and belief, denies that unless a receiver is appointed for said irrigation system and for operating the same, the said Twin Falls Salmon River Land & Water Company will oppress complainants or other settlers on said tract, or that its operations or conduct or management of said irrigation system will result in a multiplicity of suits or any suits; denies that either the said Twin Falls Salmon River Land & Water Company or the Twin Falls Canal Company, Limited, has refused or will refuse to adopt a reasonable or proper system of delivery or as required by the condition of the crops, or will refuse to recognize the rights of complainants and other settlers on said tract, or any of them, or will refuse to deliver water to complainants and other contract holders on said tract, at such times and in such manner and in such quantities as they may be entitled to receive the same under their respective contracts, and upon its information and belief this defendant further denies that complainants and other settlers or persons entitled to receive water from said irrigation system have not in the past received the water to which they were entitled or as the needs of their respective crops required the same, or that the methods or system of delivering water to complainants and other settlers on said tract has caused hardship, annoyance or loss of crops, and this defendant likewise denies, upon its information and belief, that a continuation of the

system or method of delivering water in the past will produce any loss or damage to the complainants or persons entitled to water from said system, or will result in numerous or other claims for off-sets or reimbursements from the amounts due from settlers under their respective contracts for the purchase of water rights; and denies that the amount due from settlers or purchasers of water rights constitutes a trust fund available for any purpose except for the payment of the bonds issued under the mortgage or trust deed under which this defendant is trustee or under other similar obligations providing for the pledge or deposit of such water contracts, or by mortgage or lien upon said irrigation system or on said water contracts, or both such irrigation system and water contracts; that as to whether the settlers upon said tract, or any of them, will refuse to pay the balance due on their water contracts unless such balance be held to constitute a trust fund for the purposes set forth in paragraph XXVIII of said amended bill, this defendant is not advised, save by said amended bill, and being without knowledge as to such matters, prays that complainants be required to make strict proof of said allegations and each of them.

XXI.

This defendant admits that some time after the 1st day of June, A. D. 1908, but as of said date, the said Twin Falls Salmon River Land & Water Company made, executed and delivered a certain mortgage or deed of trust conveying to the American

Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, with its principal office in the City of Chicago, said State, as Trustee, the irrigation system, water rights and water appropriations described or referred to in plaintiffs' amended bill of complaint, including the reservoirs, dams, canals, ditches, laterals and other structures of every kind used in connection with or forming a part of said irrigation system, together with all rights of way, easements, privileges and franchises required for the proper operation and use of said irrigation system, and that as further and additional security for the payment of the bonds issued and to be issued under said mortgage or deed of trust there was assigned to and deposited with the said Trustee, The American Trust and Savings Bank, contracts sometimes referred to in said amended bill as Settlers' Contracts, to the aggregate amount par value, as this defendant is informed and believes, of \$2,337,319.92; and that, pursuant to the terms and provisions of said mortgage or deed of trust, the said American Trust and Savings Bank, Trustee, certified and delivered the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company to the amount of \$1,773,000.00, par value; that said bonds were issued upon the terms and conditions stated in said mortgage or deed of trust referred to in paragraph XXIX of said amended bill and only after there had been duly assigned to and deposited with the said Trustee water contracts or settlers' contracts to the amount afore-

said; that this defendant denies on its information and belief that said mortgage or deed of trust was made or executed or said bonds issued or delivered or said water contracts assigned to said Trustee before the construction of said irrigation works referred to in said amended bill, and this defendant prays leave to refer to said original mortgage or deed of trust when the same may be produced or to the record thereof referred to in said amended bill for a full and complete statement of the terms and conditions of said instrument and the terms and conditions upon which said water contracts or settlers' contracts were assigned to and deposited with said Trustee and said bonds issued, certified and delivered; and this defendant alleges that the bonds so issued, certified and delivered, as aforesaid, to the amount of \$1,773,000.00, par value, were negotiated and sold by said Twin Falls Salmon River Land & Water Company to divers and sundry persons who purchased the same for value without notice or knowledge of any offset or defense on the part of the makers of said water contracts or settlers' contracts against the payment of the amount due thereunder, and said bonds are still outstanding, as this defendant is informed and believes and so alleges the fact to be, and in the hands of innocent holders for value, who purchased the same relying upon the faith and credit of said water contracts and settlers' contracts so assigned to and deposited and pledged with the said Trustee as security for the payment of said bonds, and relying upon the fact that the

amount specified in said contracts, and each of them, as the purchase price of the water rights or shares of stock therein mentioned would be paid with interest thereon at the times and in the manner in said contracts stated, and relying upon the fact that said contracts were a first and prior lien upon the lands therein respectively described.

XXII.

This defendant admits that on or about the 8th day of October, A. D. 1914, the said American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank), Trustee, resigned as Trustee under said mortgage or deed of trust and that this defendant thereafter and on or about the 9th day of October, A. D. 1914, succeeded to said trusteeship and is now the duly appointed, qualified and acting Trustee under said mortgage or deed of trust and holds the said water contracts or settlers' contracts under said mortgage or trust deed as security for the payment of the negotiable coupon bonds of said Twin Falls Salmon River Land & Water Company issued, sold, certified and delivered as aforesaid and held as aforesaid by innocent holders for value.

XXIII.

This defendant, according to its information and belief, denies that the said Twin Falls Salmon River Land & Water Company has failed, neglected or refused to comply with the terms or conditions, or any of them, of the said State contract or the said set-

tlers' contracts, or any of them; denies that by reason of any alleged or pretended default of said Twin Falls Salmon River Land & Water Company, the lien of said mortgage or trust deed is either impaired or subordinated or made subject or subordinate to the rights of purchasers of shares or water rights in said irrigation system, and denies that the grantee is said deed of trust took said deed of trust subject to the conditions, or any of the conditions, mentioned in paragraph XXXI, or any other paragraph or part of said amended bill; denies that the lien of said mortgage or trust deed is null or void or of no effect as against the said complainants or any other water contract holders in said irrigation system, or any other person, corporation or body politic.

XXIV.

This defendant is not advised, save by said amended bill, as to the allegations contained in paragraphs XXXII and XXXIII of said amended bill relative to an alleged assignment from said Twin Falls Salmon River Land & Water Company to the defendant, A. C. Robinson, of certain water contracts, and it, therefore, leaves complainants to make such proof of the allegations contained in said paragraphs XXXII and XXXIII as they may be advised is material or as they may be able to produce.

XXV.

This defendant is not advised, save by said amended bill, as to the facts alleged in paragraphs XXXIV and XXXV of said amended bill, and being without

knowledge as to the facts set forth in said paragraphs, it prays that complainants may be required to make strict proof of each and every allegation contained in said paragraphs XXXIV and XXXV.

XXVI.

Further answering complainants' amended bill, this defendant says that it is informed and believes, and therefore states the fact to be, that under the terms and provisions of the said water contracts or settlers' contracts and under the said State contract referred to in the amended bill herein, and under the Act of Congress commonly known as the Carey Act and the amendments thereto and the laws of the State of Idaho passed in furtherance of said Acts of Congress in order to obtain the benefit thereof, the said complainants and other purchasers of water rights in said irrigation system are only entitled to a proportionate interest in said irrigation system, water rights and water appropriations based upon the number of shares or interests finally sold therein.

XXVII.

As to each of the allegations of said amended bill not in this answer expressly admitted or denied, this defendant prays that the complainants may be required to make strict proof thereof and of each of such allegations of said amended bill as against this defendant.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant

prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

COMMONWEALTH TRUST COMPANY OF
PITTSBURGH, TRUSTEE,

By RICHARDS & HAGA,
Its Solicitors.

Endorsed: Filed December 10, 1914. A. L.
Richardson, Clerk.

(Title of Court and Cause.)

ANSWER OF A. C. ROBINSON, ONE OF THE
ABOVE-NAMED DEFENDANTS, TO THE
AMENDED BILL OF COMPLAINT OF THE
ABOVE-NAMED COMPLAINANTS.

Now Comes A. C. Robinson, one of the above-named defendants, and saving and reserving to himself all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties and imperfections in the said amended bill contained, with like effect as if this defendant had demurred thereto, for answer to said amended bill and to such parts thereof as this defendant is advised it is necessary or material for him to make answer to, answering says:

I.

This defendant has seen the copy of the answer proposed to be forthwith filed by the defendant Commonwealth Trust Company of Pittsburgh to complainants' amended bill herein, and he has no doubt that the statements contained in such answer are

correct, and he has little personal knowledge respecting the facts and allegations contained in said amended bill or the deeds, dealings and transactions therein referred to, and he therefore prays that the answer of his co-defendant, Commonwealth Trust Company of Pittsburgh, may be taken and considered as a part of this defendant's answer to said amended bill, with the same force and effect as if the statements therein contained were herein repeated or set forth at large. But, for greater certainty as to the contents of deeds and other written documents referred to in said amended bill, this defendant prays leave to refer to such deeds or documents when produced.

II.

This defendant admits that on or about the 14th day of October, 1914, the defendant Twin Falls Salmon River Land & Water Company assigned to this answering defendant certain water contracts or settlers' contracts aggregating about \$194,397.48, and that the assignment of such contracts was thereafter filed for record with the Recorder of Twin Falls County, Idaho, and recorded as alleged in paragraph XXXII of said amended bill; but this defendant denies that said assignment was without valuable consideration, but on the contrary defendant alleges the fact to be that such water contracts were assigned to this defendant as security for the payment of large sums of money loaned or advanced to said Twin Falls Salmon River Land & Water Company, and that such contracts are now held by this defendant as col-

lateral security for the sums so loaned or advanced to the said defendant Twin Falls Salmon River Land & Water Company, and such loans or advances were made and such assignments and water contracts or settlers' contracts received as security for the repayment of such loans or advances, without notice or knowledge of the pretended claims of said plaintiffs or any of them, or of the settlers or purchasers of water rights executing said contracts, and without notice or knowledge that any setoff, defense or counterclaim existed or would be made by way of defense, or otherwise, against the amount due and payable under said contracts according to the terms thereof; and this defendant is a holder for value of such water contracts without notice or knowledge of the pretended claims of plaintiffs as set forth in their amended bill herein.

Wherefore, having fully answered complainants' amended bill of complaint filed herein, this defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

A. C. ROBINSON,
By RICHARDS & HAGA,
His Solicitors.

Endorsed: Filed Dec. 10, 1914. A. L. Richardson.

(Title of Court and Cause.)

STATEMENT OF EVIDENCE UNDER EQUITY
RULE 75.

BE IT REMEMBERED, That this cause came regularly on for trial before the Court sitting in

equity on April 1st, 1915, on the amended complaint of the plaintiffs and the issues made thereon by the answers of the Commonwealth Trust Company of Pittsburgh and A. C. Robinson and the amended answer and cross-bill of the Twin Falls Salmon River Land and Water Company and the Salmon River Canal Company. Whereupon the following proceedings took place:

Mr. Haga: We waive proof of the citizenship of the complainants and admit correctness of plaintiff's Exhibit "C" the Settlers' Contract and further that the complainants by themselves or predecessors in interest have made contracts with the Twin Falls Salmon River Land and Water Company in the form of Plaintiff's Exhibit "C"; that all the settlers' contracts so far as the printed form is concerned are the same.

Mr. Longley: May it please the Court, it is our understanding of the rules that to this cross-bill we will be required to file a reply.

Mr. Hays: That may be done at any time, and the Court can consider it done.

The Court: The time to reply or answer to the cross-bill, if an answer is required, will be extended for a reasonable length of time, after I have ruled upon the motion.

Mr. Longley: Very well, your Honor.

The Court: It is to be tried upon the first amended complaint, is it?

Mr. Longley: Yes, sir.

The Court: You may proceed with your evidence. There is an amended answer to this complaint?

Mr. Hays: There is an amended answer and cross-bill. They are all together.

Mr. Golden: If your Honor please, there are a number of issues raised by the answer of the trustees. It denies the citizenship of the complainants, and other things of that kind. I think perhaps Mr. Haga didn't mean to do that, and perhaps we may stipulate here to reduce the proof considerably.

Mr. Haga: We waive the proof of citizenship of complainant.

The Court: The Twin Falls Salmon River Land & Water Company, is that the construction company or the holding company?

Mr. Hays: It is the construction company. The Salmon River Canal Company, Limited, is the operating company.

Mr. Golden: Do we understand that it appears that you admit that all of these complainants, by themselves or their predecessors in interest, have made contracts with the Twin Falls Salmon River Land & Water Company similar in form and substance to Exhibit "C," being the settlers' contract, attached to the complaint?

Mr. Haga: Yes, we will admit that. We admit the citizenship, and we admit the correctness of the form of contract.

The Court: You say there is an answer of the trustee?

Mr. Haga: Yes, your Honor, answer of the trus-

tee, and I believe by Mr. Robinson, A. E. Robinson.

The Court: By trustee you mean the Commonwealth Company?

Mr. Haga: Yes, your honor.

Mr. Golden: And will counsel for defendants admit that all contract holders upon the Salmon tract holding contracts similar to the contract called Exhibit "C" are similarly situated with the complainants, to the extent that their contract and rights under the contract are alike and similar?

Mr. Hays: There is no objection to that, as I understand it.

Mr. Haga: I understand that all contracts made with the settlers are of the same kind, so far as the printed form is concerned. The description of the land and the ditches and the amount of payments may vary.

Mr. Golden: But that they are similarly situated with the complainants with reference to their right under the contracts, that is, the construction of the contract?

Mr. Longley: The particular terms and provisions of the contract?

Mr. Haga: If you have reference to matters outside of the contract, then we will not stipulate, but so far as the contracts are concerned, they read alike.

Mr. Golden: What I meant was this, that all settlers on the Salmon tract are in the same position with reference to their rights under the contract,

that is, as a matter of law, their rights are similar and alike.

Mr. Haga: I understand, Mr. Golden, that you may claim that some of your clients may have rights based upon representations that have been made upon the prospectus or circulars that have been issued, and, if so, upon behalf of the trustee I wouldn't stipulate that there is any right in any party outside of what is in the contract.

Mr. Golden: Only to the extent, Mr. Haga, that all contract holders are similarly situated as to their rights under the contract itself.

Mr. Haga: Isn't that covered by our stipulation that all contracts are alike?

Mr. Golden: I want it for the purpose, Mr. Haga, that there is a general allegation in our bill that all persons on the Salmon tract are similarly situated insofar as their contractual relations are concerned.

Mr. Longley: Eliminating everything except the plain terms and provisions of the printed contracts. That would eliminate any question of misrepresentations.

Mr. Haga: You eliminate from the matter all questions of representations or misrepresentations?

Mr. Longley: Yes. Under this stipulation, yes, insofar as others not parties to the record are concerned.

Mr. Haga: Yes.

Mr. Golden: That is agreed to then by counsel for the other defendant?

Mr. Hays: Yes. I will say here, Mr. Golden, that

perhaps the similarity of contract is not absolutely correct, although substantially so. All Carey Act contract holders have this form of contract. There is a slightly different form of contract for people having desert claims, and a slightly different form of contract for people having State land, Sections 16 and 36, but those differences seem to be unimportant, because the substance of the contract is the same, the contract only being made a little different to fit into the different characters of land.

Mr. Golden: Would it be agreeable to your Honor to take a recess now? Perhaps we can stipulate a great deal now, between now and afternoon, and save a great deal of time.

The Court: Very well, until 2 o'clock.

Mr. Golden: We understand, your Honor, that defendants will stipulate for the purpose of saving the time of the Court, and a number of other matters, that might require some time to take it up in the introduction of proof. It it, I understand, conceded that no patent had been issued for any of the Carey Act lands on the Salmon tract, under the Salmon River segregation. That is correct, Judge Hays?

Mr. Hays: I think so. I think it may also be admitted that none had been applied, may it not?

Mr. Longley: I am not advised as to that.

Mr. Hays: None has been applied for.

Mr. Golden: It is admitted, your Honor, by counsel for the defendants that the Twin Falls Salmon River Land and Water Company, on or about the 1st day of June, executed a trust deed to the American

Trust and Savings Bank, a corporation organized under the laws of the State of Illinois, trustee, on the trust deed, by which it incumbered all of its property and all the franchises that it had under this contract with the State of Idaho, and, as additional security for the payment of the indebtedness created by the first lien, it assigned water contracts similar to Exhibit "C" of the par value of \$2,337,319.22, and that under the terms of the trust deed the American Trust and Savings Bank, as trustee, has certified and delivered negotiable coupon bonds of said issue of the par value of \$1,773,000.00, and that all of those bonds are outstanding, unpaid, in the hands of bondholders. Am I right, Mr. Haga?

Mr. Haga: Yes.

Mr. Golden: And that the Twin Falls Salmon River Land & Water Company has defaulted in the payment of the interest upon those bonds, principal and interest?

Mr. Haga: There is no principal due, Mr. Golden.

Mr. Golden: But it has defaulted in the payment of interest?

Mr. Haga: For at least one interest period. I am not prepared to say how long, but at least one interest period. Mr. Golden, I don't want to admit that the mortgage was executed on the 1st day of June. As a matter of fact, it was executed some time after the 1st of June, but as of—the date of it is the 1st day of June, but it was executed after the contracts to which you have referred had been executed by the various purchasers of water rights, and at the time

that they were delivered to the trustee as security for the bonds.

Mr. Longley: Why not refer to the trust deed as bearing date the 1st day of June?

Mr. Haga: I want the record to show that it was not executed on that day. It was executed, I think, about two months after that time.

Mr. Golden: And that thereafter the American Trust & Savings Bank, original trustee, resigned, and the Commonwealth Trust Co. of Pittsburgh was substituted and appointed trustee in the place and stead of the American Trust & Savings Bank, and has accepted the trust, and now acting as trustee under this bond issue, under this trust deed, with residence at Pittsburgh, Penn.

Mr. Haga: The facts in relation to that are as set up in the answer of the Commonwealth Trust Co. to the amended bill of complainants in this case.

Mr. Golden: That in addition to the transfer of these water contracts to the trustee under the trust deed the Twin Falls Salmon River Land and Water Company has transferred and assigned to one A. C. Robinson, also a resident of Pennsylvania, water contracts similar to Exhibit "C" in this case, and that he now holds such water contracts.

The Court: Holds them as owner or as collateral only?

Mr. Golden: As collateral only for the payment of indebtedness, or for money advanced by Mr. Robinson, I believe you so state in your answer, do you, Mr. Haga, of A. C. Robinson?

Mr. Haga: Yes, our agreement as to the facts will be in accordance with the statements contained in the answer of A. C. Robinson. The facts are set forth in that answer, Mr. Golden, and we attest that the facts there pleaded are correct.

Mr. Golden: I understand that the Twin Falls Salmon River Land and Water Company stipulates and concedes that it has never delivered water to any of the contract holders on the contracts known as Exhibit "C" to the extent of 1-100 of a cubic foot of water per acre, per second of time, continuous flow, from the 1st day of April to the 1st day of November of each irrigation season. Is that correct, General?

Mr. Hays: That, I take it, Mr. Golden, covers the question of continuous flow from April 1st to November 1st of each year. I so understood it, and, that being the case, that would be a fact, as I understand it, that is, between those two dates, continuously.

Mr. Golden: Then will the defendants stipulate that the amounts due under these water contracts which have been assigned either to the trustee under the trust deed or to A. C. Robinson, are due and payable, and to be paid to the respective assignees, that is, the trustee under the trust deed, and A. C. Robinson, under this assignment?

Mr. Haga: If the Court please, we furnished them a copy of the trust deed under which these contracts have been pledged as security, and that should be sufficient evidence of the relative rights of the

trustee and of the Twin Falls Salmon River Land & Water Company.

Mr. Longley: Is our request inconsistent with the trust deed?

Mr. Haga: That trust deed is a lengthy instrument, and I am not prepared to say just what all the facts are. It is, of course, on the question that the contracts, so far as necessary, must first be applied to the payments of the bonds issued under that indenture. After that, the balance will go to the Twin Falls Salmon River Land & Water Company or its assigns.

Mr. Golden: Is that the qualification you want to make to the stipulation, Mr. Haga?

Mr. Haga: The statement I have made may be accepted, if you will accept it as a stipulation as to the manner in which the contracts are held.

Mr. Golden: But to the extent of the full payment of the indebtedness for which these contracts were assigned as security, that the amounts due under these contracts must be paid to the trustee in the trust deed, and the assignee, Mr. A. C. Robinson?

Mr. Haga: I think, Mr. Golden, you are asking us to stipulate to a lot of matters that we should not be asked to stipulate on. We are willing to furnish the trust deed, and I am not prepared to say what other assignments there may have been made of those contracts. I am prepared to say that those contracts were pledged with the Commonwealth Trust Company as security for the bonds and pleaded

as outstanding, that so far as they are pledged with that company they must first be applied to the payment of those bonds. Now, who is entitled to the proceeds then remaining, if there are any, I am not prepared to say.

Mr. Longley: Will you stipulate, Mr. Haga, that the payment you state must be made is to be made and shall be made to the trustee and the assignee, that is, that the money which will be collected here is paid to the trustee and assignee?

Mr. Haga: That the trustee is entitled to the proceeds under these water contracts until the full amount of the bonds has been paid.

Mr. Golden: At this time we offer in evidence, your Honor, Exhibit "A," being the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company, without the necessity of identifying it, and so on.

Mr. Haga: It is the Exhibit "A" attached to the amended bill.

Mr. Golden: It is filed with the amended bill, yes, Mr. Haga. I would like to have these marked as exhibits.

Mr. Golden: At this time, your Honor, we offer in evidence plaintiff's exhibits 13 to 16, inclusive, being the four contracts entered into between the Twin Falls Salmon River Land & Water Company for the defendants in the action, and Peter Matson, the predecessor in interest of A. E. Caldwell, one of the complainants in this cause, which is in substance and form the same as Exhibit "C," meaning

the settlers' contract. I take it that there is no objection. And I understand that counsel will concede that Peter Matson, the original entryman, has assigned these contracts to A. E. Caldwell, and that he now holds them.

Mr. Hays: No objection. That is correct.

Mr. Golden: At this time I would like to have counsel stipulate that the other complainants, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, and Carl Washburn hold similar contracts with the defendant, issued about the same time.

Mr. Hays: That is correct.

E. B. DARLINGTON, being called and duly sworn as a witness on behalf of complainants, testified as follows:

"My name is E. B. Darlington. I am chief engineer and watermaster of the Salmon River Canal Company and have been engaged in that capacity for four years. Prior to that time and for the past six years I was assistant engineer on the Salmon River project, beginning in February, 1909. As chief engineer of the Salmon River Land and Water Co., it was my duty to look after matters of construction and operation, maintenance and repair work. I was employed on the project practically from the beginning of work on the canal system and have been employed continuously. I am still in the employ of the Land and Water Company as chief engineer and it is my understanding that I am so employed as superintendent of operation in charge of the work for the

canal company; and after beginning work for the canal company I continued up to the present time in the employ of the Land and Water Company.

"I have no records in my custody which would enable me to state the number of acres embraced in outstanding water contracts of the Salmon River Land and Water Co., but can approximately state that there are about 73,000 acres. The water for the irrigation of land embraced within the segregation form what is locally known as the 'Salmon River,' which river and its tributaries are the only available supply that I know of, but I have made no investigation to determine the availability or possibility of securing other water for the supplying of the segregation. I have in my possession records which will enable me to state the acreage settled up and in crop for the years 1912, 1913 and 1914. In 1912 the total acreage in crop was 16,310 acres; in 1913 there was a total crop of 23,403 acres; in 1914, a total of 30,064 acres.

"The water first began to run in our reservoir and be conserved there during the latter part of 1910, but it did not become available for diversion into the canal system until April, 1911. On the first of October, 1912, after the runoff for the year 1912 had been discontinued, there was an available storage of 43,550 acre feet. There was delivered about 29,350 acre feet of water for irrigation during the year 1912, measured at the Farmers' weir. On the first of October, 1913, at the close of the runoff for that year, there remained 27,110 acre feet in the

reservoir, and during that year there was delivered at the farmers' headgates 50,175 acre feet. On the first of October, 1914, at the close of the runoff there was an available supply of 16,500 acre feet in the reservoir. During that year there were delivered 73,933 acre feet to the farms. The amounts delivered for each of the years did not include domestic supply but was delivered simply for irrigation purposes. Water for domestic supply was not measured over the weirs. On the 27th of March, 1915, I saw the water gauge in the reservoir which showed about 161½ feet or 25,000 acre feet stored in the reservoir. On March 31, 1913, there was 50,600 acre feet stored in the reservoir, and about the last of March, 1912, there was about 8,377 acre feet in the reservoir. On March 31, 1914, there was stored in the reservoir 51,600 acre feet.

"I have supervision over the distribution of the water and my duties at the present time are practically the same as when I was solely employed by the Land and Water Co. The demand was made upon me for the delivery of water, the most general demand being for delivery of 2¾ acre feet for the season.

Q. Were those demands complied with by you?

A. In some cases.

Q. Were they refused or denied?

A. No, not on that ground.

Q. You say not on that ground?

A. Not on the ground of any specific amount.

Q. Upon what ground, if at all?

A. There was no limitation, as we understood it, governing that total amount to be delivered.

Q. In other words, you declined to recognize the right of the water contract holders to receive any specific amount?

A. Any specific total amount, yes.

Q. And declined to accede to the demands of the water users for the delivery of any specific amount, because of that fact?

A. Oftentimes water was refused, that is, the demands were refused where the demand was excessive.

Q. Were the demands of the water contract holders who requested or demanded the delivery of a specific amount acceded to by you or refused?

A. Perhaps neither one. They weren't refused. I never refused that amount of water, just because it was that amount of water.

Q. I didn't ask you why you refused. I asked you if you did refuse to deliver to these water contract holders any specific amount of water upon their demand at any time?

The Court: That is, any specific amount demanded by them.

A. For the season, yes.

Mr. Hays: Did I understand you to say for the season?

A. If that was a specific demand for the season, I would refuse to deliver it.

Mr. Longley:

Q. And that was during all of the years 1912, 1913 and 1914?

A. Yes.

Q. Those demands were made during each of the years mentioned?

A. I presume so.

“These demands for water were made during each of the years 1912, 1913 and 1914, but were not always in the form of a demand for $2\frac{3}{4}$ acre feet for the season. Demands have been made upon me for the delivery of a continuous flow of $\frac{1}{2}$ inch per acre from April 1st to November 1st, which demands have not been complied with in any case; irrespective of the amount of water stored in the reservoir, it is my custom to deliver water to all customers who have put themselves in good standing by paying their maintenance.

“I cannot make any estimate that I would rely upon as to the amount of water that will be available for distribution by the first day of May based upon the experience of past years, while I have been chief engineer or watermaster upon the Salmon. From the 1st day of April, 1914, to the 1st day of May, there was an increase of 30,000 acre feet in the reservoir; during the same period of time in 1913, there was an increase of 20,000 acre feet, making an average of 25,000 acre feet increase in the reservoir for the two years. That 25,000 acre feet is the fair runoff for the river during that period for each year. Assuming that there will be an additional 25,000 feet during the month of April, 1915, there will be approximately 50,000 acre feet on May 1st, 1915. The distribution of water begins usually in the first

week of May of each year. Assuming that the same number of acres are cultivated in 1915 as in 1914 and that there is a continuous flow of $\frac{1}{2}$ inch per acre, that amount will last for about 60 days. Assuming that there is 25,000 acre feet in the reservoir the first day of April, 1915, and that the runoff from the river will be the same as for the year 1914, there will be an available storage of 87,200 acre feet from April 1st to November 1, 1915; and upon the same assumption there would be an available storage of 81,200 acre feet from the first day of April to the first day of August, 1915. During the year 1912 there was distributed 1.8 acre feet per acre of land, and during the year 1913 there was distributed 2.14 acre feet per acre, and for 1914, 2.46 acre feet per acre. Assuming that 1.2 inch per acre continuous flow were delivered each month continuously for the entire segregation of 73,000 acres, there would be delivered about 730 acre feet per day, not allowing anything for transmission or reservoir losses. In 1912 the transmission loss was about 50%; in 1913, 33%; in 1914, 27.3%. The reservoir losses for 1912 were 64,181 acre feet; in 1913, 46,314 acre feet; in 1914, 38,032 acre feet. Assuming the entire tract to be under cultivation and taking into consideration the reservoir and transmission losses, the same as for last year, distributing the water at the rate of $\frac{1}{2}$ inch per acre for all the lands on which water contracts are outstanding, and assuming the same runoff from the river as during the year 1914, the available supply including May, June, July, August,

September and October, would last about 50 days. The water supply would last for about 30 days, or during the month of May, if those assumptions are made, if the runoff during June, July, August, September and October was not taken into consideration. Mr. Hall is president of the Canal Company. The Salmon River Land and Water Company hold a majority of the stock and have control of the Canal Company."

On cross-examination, Mr. Darlington testified as follows:

I am familiar with the records of the measurements made by the Geological Survey. The figures which I have given were based upon those taken under my direction and not upon figures of the Geological Survey. A continuous flow of $\frac{1}{2}$ inch per acre for 73,000 acres would be equivalent to 730 acre feet per day. I mean that a flow at the rate of $\frac{1}{2}$ inch per acre continuously for 73,000 acres is the equivalent of 730 acre feet per day, or half an inch per day. 36,500 inches would be the equivalent of 730 acre feet or half an inch per acre per day, continuous flow for 73,000 acres; 730 second feet equal 1460 acre feet per day; or approximately 1460 acre feet per day; I think possibly my computations made in haste may have been incorrect, some of them. With this change in my figuring the runoff as heretofore testified to by me would be reduced to about fifteen days or about 50%.

G. M. Hall being called first and duly sworn as a witness for complainant testified as follows:

“My name is G. M. Hall. I am general manager of the Twin Falls Salmon River Land & Water Company of Hollister and President of the Salmon River Canal Company, Limited, and have been so engaged since last August. The stock of the Canal Company is in the name of the contract holders, that is, those who made contracts with the Land and Water Company. Under the terms of the contracts the stock in the Canal Company is held with the contracts and is voted by the trustee, or the Land and Water Company. The trustee I refer to is the trustee named in the mortgage, which I presume is a trust from the Land and Water Company securing the bonds of the Land and Water Company. The stock of the Canal Company is assigned and held with the contracts. The voting power of these shares, under the contract, is in the Land and Water Company until a certain percentage of the contract price has been paid; and I voted, as General Manager of the Land and Water Company, on those shares. The shares in the Canal Company are assigned back to the land company and are held by the trustee for the bond holders. The trustee, insofar as I am advised, does not exercise any control or management over either the Land and Water Company or the Canal Company. The trustee I refer to is the Commonwealth Trust Company of Pittsburg. I am not a representative of that company, but am General Manager of the Twin Falls Salmon River Land & Water Company, selected for that position by the officers of the Land and Water Company and directors at Pitts-

burg, I presume, I do not know where. I do not know whether any formal transfer or order has been entered turning the system or the operation of the system from the Water Company over to the Canal Company." Whereupon Mr. Haga inquired of counsel by whom was the order entered to which he referred. Counsel for plaintiff stated, "The State Land Board." The witness further testified: "Insofar as I am advised the Land and Water Company is in control of the Canal Company, and entire irrigation system, in that a majority of the shares of the stock in the Canal Company is controlled by the Land and Water Company."

On cross-examination the witness testified as follows:

"I don't know which company has been in control of the system for the last year or two, as I have only known it since last summer, but since that time it has been in the hands of the Salmon River Canal Company and that company was in control of the system when I first became acquainted with it."

H. M. Sims, being called and duly sworn as a witness for complainant, testified as follows:

"My name is H. M. Sims. I am one of the complainants in this action, and reside at Hollister, Idaho. I am one of the contract holders with the Twin Falls Salmon River Land & Water Company and have been since early in the year 1912. I own 160 acres." Whereupon the following proceedings were had:

The Court: "Isn't it admitted this gentleman owns a contract? I thought you had a stipulation today."

Mr. Longley: "Yes, your Honor." Whereupon witness further testified:

"I have made one payment upon the entire 160 acres, made at the time of the contracts were taken out. Since then I believe three payments have been made on one 80 and only one payment on the other 80. I had discussions with Mr. Darlington and Mr. Hall with reference to the amount of water delivered under my contracts during the years I owned the land. The contract on the 80 has been fully paid up to date. I do not just recall what time is specified in the contracts. I cannot say whether they were paid up in 1914 because they were paid by a readjustment which I had with the company, which I believe was equivalent to three payments including the first payment. I have made demands upon the Land and Water Company for the delivery of the amount of water specified in the contract. I advised Mr. Darlington, the water master, and Mr. Hall, and J. S. Green, who claimed to be a representative of the bond holders, and also Maurice Aitkin, a claim agent of the company, as to the amount I had expected for my place. I demanded of the Land and Water Company or the Canal Company one one-hundredth (1-100) cubic foot of water per acre per second of time, provided for in the contracts, but this demand was not complied with. The water master of the Company told me that the contracts did not

specify that amount of water continuous flow. I have not tendered performances with reference to the payment of installments because of the opinion given me by different officials of the company that I did not purchase a water right, but had merely purchased a proportionate share in an irrigating system which was absolutely worthless to me without the water, so I refused to make payments. I am ready, willing and able to comply with my part of the contract relative to payments thereunder upon the conveyance of the amount of water specified in these contracts, and the delivery of that water as per the contract. I have cleared 150 acres of the 160 and have enclosed the entire place with a good fence. I have a little house and concrete barns and ditch system, and a contour map and an engineering survey to determine the most efficient ditch system for my farm, and other out-buildings such as a granary and implement shed and the like, which, with the payments that I have made I would value at about \$8,000.00 for the 140 acres, because I have sold 20 acres during the last few weeks. I have farmed part of this land for two years, but have not had it farmed any other time. I did not receive from the Land and Water Company or the Canal Company one one-hundredth (1-100) of a cubic foot of water per acre per second of time for the land embraced in these water contracts during the irrigation season of each year while I held these water contracts. I have been advised at different times that I could not have more water when I asked for it. That is the extent

of any advice I ever received from the company relative to water deliveries. I was never asked by the Land and Water Company or the Canal Company or any one in their behalf to participate in any of the rules or the adoption of rules for the delivery of water to me, or the method or manner or the amount of water to be delivered to me with possibly the one exception. Mr. Hall spoke to me about ten days ago, that at a meeting of the directors of the company settlers would be given an opportunity to discuss the method of delivering water this season. No such method was employed by the company prior to this occasion."

Witness examined plaintiff's exhibit No. 17, which is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT NO. 17.

"IDAHO, THE LAND OF OPPORTUNITY."

TWIN FALLS — SALMON RIVER
IRRIGATION PROJECT.

80,000 Acres of Carey Act Lands were opened for entry under the canal system on June 1, 1908. 70,000 acres of this land were filed on during the month of June.

SEVERAL THOUSAND ACRES OF CHOICE
LAND ARE STILL OPEN FOR
THE HOMESEAKER.

This tract of land affords better inducements to the homeseeker than any other tract of land in the northwest. Water supply of the best and in abundance. Climate, soil and topography of the country unex-

celled. These lands are divided from the famous Twin Falls tract only by the canal of the Twin Falls Company, and lie but four and one-half miles south from the Magic City of Twin Falls.

HOW LANDS AND WATER RIGHTS ARE SECURED.

Under the provisions of the Carey Act, each of the semi-arid States are granted 1,000,000 acres of land, provided that the State will procure private capital to reclaim the land. This is done and the State Land Board supervises the entire construction of the irrigation system and dams. The Land Board advises and looks after the interests of the settlers.

The entire canal systems and dams ultimately become the property of the settlers.

Any citizen over the age of 21 (except married women) can file on Carey Act lands, not exceeding 160 acres. Your Carey Act right is good even though you have used all your other government land rights.

The Carey Act is the most liberal and beneficial of any government act for the acquirement of land.

FINAL PROOF.

When an entry is made the entryman may, if he so desires, begin clearing his land, and if he has one-eighth of it in cultivation, seeded and ready for irrigation when the water is ready for delivery, he can at once publish his notice of intention to make final proof. This notice must be published five weeks, during all of which time he must reside on his land

with his wife, if married. After final proof, residence on the land is no longer required to hold title. The law requires that the entryman must establish a residence on the land within six months after water is available and maintain such residence until final proof is made. Final proof may be made at any time after reclaiming one-eighth of the land and within three years.

The Carey Act permits one person to file upon land for another so that by giving a power of attorney you may secure land without first going upon it. We furnish power of attorney blanks free on application. Clearing, planting and irrigation may be arranged by contract.

PAYMENTS.

The price of the water right and land on the Salmon Project is fixed by the State Land Board at \$40 for the water right and 50 cents per acre for the land.

The first payment of \$3 on the water right and 25c on the land is made at the time of filing.

The payments on the water right are as follows:

At time of filing, \$3.00 per acre.

April 1, 1911, \$2.00 per acre.

April 1, 1912, \$2.00 per acre.

April 1, 1913, \$2.00 per acre.

April 1, 1914, \$2.00 per acre.

April 1, 1915, \$2.00 per acre.

April 1, 1916, \$4.00 per acre.

April 1, 1917, \$4.00 per acre.

April 1, 1918, \$4.00 per acre.

April 1, 1919, \$5.00 per acre.

April 1, 1920, \$5.00 per acre.

April 1, 1921, \$5.00 per acre.

Interest at 6 per cent. per annum begins on the deferred payments on April 1, 1910, at which time water will be ready for delivery to the settlers.

Payments in full on water right do not have to be made at time of proving up. You still have the full time to make payments after final proof.

Table showing the amount of payments required at time of filing on each legal subdivision of 40, 80, 120 or 160 acres:

40 acres, payment required.....	\$131.50
80 acres, payment required.....	262.50
120 acres, payment required.....	393.50
160 acres, payment required.....	524.50

THE PRODUCTS.

Fortunately for the Salmon project, the productiveness and fertility of the soil has been demonstrated by the Twin Falls South Side tract, of which it is really a portion. Within a few feet of the Salmon lands adjoining the high line canal of the Twin Falls system for a stretch of more than 20 miles are cultivated farms which show for themselves. On these farms three cuttings of alfalfa are obtained each year and yields of 10 tons to the acre are common. Farmers living within a stone's throw of the Salmon tract have cleared from \$30 to \$50 per acre on a single crop of clover seed. Potatoes of the highest

quality yield abundantly, the highest yield reported being in excess of 500 bushels to the acre, obtained by A. P. Senior and Fred Ramsey of Twin Falls. Grains of all kinds produce wonderfully. In competition for the prize offered for the best yield of wheat and oats in fields of not less than 10 acres, virgin soil produced 74 bushels of Bluestem wheat and 116 bushels of oats to the acre. These fields were measured by engineers and in each instance the figures were substantiated by the affidavits of four witnesses. Vegetables of all kinds are grown in abundance and unsurpassed in quality.

On Rock Creek, which touches the northeastern boundary of the Salmon project, and where the conditions are identical, peaches, apples, prunes, pears and plums have been grown successfully for 28 years. During that period peaches failed but four times. Nine successive crops have been grown without a failure. The varieties of apples grown include Jonathans, Rome Beauties, Winesaps, Northwest Greenings, Northern Spies, Golden Russet, Yellow Transparent, Arkansas Black, and other well-known varieties.

TOPOGRAPHY.

This vast area is peculiarly favored for irrigation. It slopes gently to the northwest and has perfect drainage, thus insuring no sour soil or impure water, which proves injurious to crops.

CLIMATE.

The climate is considered ideal. Nights are cool and every day pleasant. There are some hot days,

but owing to absence of moisture in the atmosphere the heat is not oppressive. No cyclones, sudden changes, withering hot winds or sultry weather. Winters very mild, and seldom is there snow enough for sleighing.

WATER SUPPLY.

The water supply for the Twin Falls Salmon River project is obtained from the Salmon river, which has a vast drainage area in the Cassia national forest reserve. The water right is perfect and there is no land susceptible of irrigation above the Salmon tract and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres, in normal years, and as a rule the spring runoff is far greater than the amount of water required for the irrigation of this amount of land for the full season.

NATURAL ADVANTAGES.

The Salmon tract borders on the Cassia national forest reserve, where settlers can secure range and free fuel, and this in itself is a great item. There are numerous springs along the east boundary of the segregation of both hot and cold water. Wells have been obtained at from 20 to 100 feet on some portions of the tract.

MARKETS.

There is a large home demand for all products, and stockmen and the mining camps of Idaho and Montana are also consumers of the produce of the farms. Representatives of 16 commission houses were in Twin Falls at one time last season purchas-

ing wheat, oats, barley and other grains, and many carloads of the finest potatoes were bought and shipped. We are less than 600 miles from Portland, one of the largest grain shipping ports in the world, and with the completion of the proposed Idaho-Nevada Southern railroad, now surveyed through the tract, we will be nearer San Francisco than the agricultural districts of the great state of Utah. The Salmon tract is far nearer to the desert mining camps of Nevada than any other district.

NOT AN EXPERIMENT; THE PROOF IS HERE.

Two hundred and forty thousand acres under the Twin Falls Canal system, south of the Snake river, have been under water for two years; the phenomenal crop yield clearly demonstrating the richness and productiveness of the soil.

HERE ARE A FEW PRIZE CROPS:

84½ bushels of wheat per acre.

119 bushels of oats per acre.

94 bushels of corn per acre.

524 bushels of potatoes per acre.

22 tons of sugar beets per acre.

9 tons of alfalfa per acre.

OPPORTUNITY.

The Twin Falls-Salmon tract adjoins these lands and comes within 4½ miles of the magic city of Twin Falls. Same soil, same climate, same electric power, and equal advantages throughout.

The demand for irrigated farms, with reliable water rights, is so great, and the desirable sections

capable of irrigation are being settled up so rapidly, that it is only a question of a few years until irrigated lands will bring fabulous prices and the opportunity will be past to secure lands at \$40.50 per acre or many times that amount.

IRRIGATION.

Irrigation makes the farmer independent of rainfall, multiplies the productive capacity of the soil and creates wealth from the sunshine, water and land. This is why the farmer of the East is disposing of his farm there and coming to Twin Falls and securing lands under this great canal system that gives assurance of abundant and certain crops.

TRANSPORTATION.

Make application for rates to Twin Falls to D. E. Burley, general passenger agent, O. S. L. Ry., Salt Lake, Utah; E. L. Lomax, general passenger agent, U. P. Ry., Omaha, Neb.; C. A. Cairns, general passenger agent, C. & N. W. Ry., Chicago, Ill.

FREE TEAMS.

Free teams with competent drivers who are familiar with the lands are furnished land seekers to aid them in selecting their land.

INVESTIGATE.

The company desire that prospective settlers make a personal investigation of the lands, terms and all other conditions before making an entry. We employ no agents and pay no commissions. Home-seekers are their own agents. Careful investigation and inquiry by the settler is the wish of the company.

HOLLISTER.

Hollister is the name given to the new town to be built about the middle of the Twin Falls-Salmon River tract.

The power plant at the Great Shoshone falls will furnish power and light for the new city.

Artesian water can be supplied for domestic use.

The proposed Idaho-Nevada Southern Railroad will connect Hollister with Twin Falls and with Wells, Nevada, the junction of the Southern Pacific and Western Pacific railroads. Electric roads are also proposed that will enter Hollister.

Hollister will be the CITY of the Twin Falls-Salmon tract.

Investment in lots at Hollister are sure and safe. Hollister will be the distributing point for the entire tract.

To those looking for a place to engage in business there is no other point that offers better inducements and a brighter future than does Hollister. With the advent of water this town will forge to the front as has the magic city of Twin Falls.

Hollister has the location and all the natural advantages to make a city.

TWIN FALLS - SALMON RIVER LAND &
WATER CO.

W. S. Kuhn, President.

For further information, address

TWIN FALLS INVESTMENT CO., LTD.,

TWIN FALLS, IDAHO.

Sole agents for sale of water rights and town lots.

No agents employed or commissions paid.

C. B. Hurtt, Pres. I. B. Perrine, Vice-Pres. and Gen. Mgr. H. L. Hollister, Vice-Pres. R. M. McCollum, Ass't Gen. Mgr. R. H. Cost, Sec'y.

G. F. Sprague, Treas.

and further testified:

"I have seen pamphlets in the same form, containing the same matter, printed evidently at the same time these were, with the same company. I saw these pamphlets prior to the time I took assignments to the contracts which were issued by the Land and Water Company and read them before I purchased assignments. I relied upon the statement contained in the circulars issued by the company to the effect that the State of Idaho guaranteed to protect the settlers in these matters and also, in a general way, upon the amount of land that was to be reclaimed, and upon the sufficiency of the water right.

"I have known Mr. S. H. Hays, or General Hays, and known that he has been the attorney for the Twin Falls Salmon River Land & Water Company for years, and have never heard General Hays make a statement with reference to the position the Land and Water Company took as to what was purchased under these contracts. I am familiar with the water deliveries down on the Salmon tract since I have been there, and have been over the tract more or less and am familiar with the deliveries of water to the farmers on the tract as to volume, or quantity, or regularity or water. In 1912 the deliveries were very irregular with regard to time and were by a system of

so-called rotation, that is, rotated in the ditches rather than amongst the farmers; by that I mean that the water would be in the canals for a period of ten days or two weeks and then not in the canals during a similar period. There was no depending upon the times when the water would be in the canals or not in the canals. A similar system was practiced during 1913, but during 1914 the water was in the canals and available to the farmers during a much larger period than during the other two years. The water was not delivered in a greater head than was as they called a head—the Canal Company called a head of water a half inch of water, that is, 1-100 of a second foot per second of time, during the summer of 1914, they delivered what they called a head and a half of water, which, to the forty acres, was equivalent to thirty inches, but they did not deliver this during a sufficient time to make the total amount delivered equivalent to what would have been had they delivered it during the entire irrigation season at the rate of 1-100, or 20 inches to the forty. In 1914 the water was turned on when the crop was requiring it. There was practically a continuous run of water from the time it was first turned on in 1914, with two or three interruptions, said to have been made for repairs, until in August during the very hot weather, when the water was turned off for ten days. The flow discontinued shortly after the first of August and was off ten or twelve days, I believe, and was finally discontinued for the year about the 5th or 6th of September. No deliveries were made

after that time except for domestic purposes. Steps were taken by the settlers on the tract during 1912, 1913 and 1914 to compel the company to deliver water under the contracts. I am familiar with the suits brought in 1913 and 1914 by Mr. Caldwell and also by other parties who were contract holders and settlers on the tract to compel the delivery of sufficient water."

On cross-examination Mr. Sims testified as follows:

"I am the owner and publisher of the 'Hollister Herald,' which paper I took over about the 1st of October, 1913. I was a subscriber to it before that time. It was the custom to print in that paper articles about the time of water deliveries, when the run would commence and so on. I did not take charge in 1913, in that it was too late for that purpose. K. H. Dixon was in charge before that time. In 1914 I do not believe there was a schedule of water deliveries printed while I had charge. In 1912-13 I was there on the tract on my farm and was not then in the newspaper business. It was the general plan to have the water run during those years for 20 days on then 10 days off, then 20 days on and then 10 days off and so forth, but that was not a practice. I do not know when the water was turned on in 1913, and do not know how long it ran after it was turned on. I have a record, but not with me, as to the time it was on and off in the main canal in 1913, but cannot give the times. I am a director of the Water Users Association, and have been Secretary since

March, 1913, and have taken a very active interest in the Association since that time. I acquired my interest in the contracts by assignment from the original entrymen who had not made any improvements on the land. The land was in a sagebrush condition when I acquired it. I proved up on the land myself and made final proof to the State in July, 1913. I got a crop on the land by that time and was living on it. That proof was accepted by the State and final certificate issued to me. I purchased the assignment before I came to the tract, at which time I was in the northern part of Idaho. I had been in that part of the country and in Washington a little over a year, I believe. I bought the land without seeing it and went on it about two weeks after the purchase, and have been on the land and in that vicinity ever since. There was a controversy in the summer of 1911 relative to the distribution of waters at that time. At the time I bought this land, in 1912, I did not know whether there was a Settlers' Association or not and did not know that there was a controversy, because I did not go on the tract to see what I was purchasing. I first examined the prospectus, plaintiff's exhibit No. 17, in the fall of 1912, but had received some of these circulars through the mail from my father, who was then in Grangeville, Idaho, and he was instrumental in getting me interested in the Salmon River tract. I am positive that before I purchased he sent me circulars and descriptive matter relative to the tract. I am unable to say when I first saw plaintiff's exhibit No. 17 except that it was before

I purchased the assignments. I did not see these except before the fall of 1912, but before I purchased the assignments to my land, which, I believe, was in January or February, 1913. I beg your pardon. I was mixed in my dates. It was 1912 and not 1913 when I first became financially interested in the land. It was then the fall of 1911 when I obtained the circular matter relative to the tract. I first received a circular, the one like plaintiff's exhibit No. 17, from my father before I became financially interested in this land, but did not supply counsel with it. I have other circulars, but do not happen to have them in my pocket. I don't know whether I received them before I became interested in the land. I made an effort to acquire copies of all the circulars used, for my own information and for the use of the Secretary of the Water Users Association, but not for the purpose of this trial. I have made no active effort as Secretary to acquire circulars used by the company or sent out by any one, whether colonization agent or others in connection with this project, but entrymen corresponding with me have forwarded copies to me. I have never written for them, but did advertise for a certain statement at one time that I wanted to obtain, but did not get it. Plaintiff's exhibit No. 17 is not the circular I advertised for. Mr. Hall told me about a meeting of the directors about ten days ago for the purpose of discussing the methods of water deliveries for 1915. I do not recall receiving a personal invitation, but I understood him to say that I would be welcome to attend and also understood

that all water users would be welcome to attend. I did not attend. I am not farming my land myself, but it is rented and was rented last year on a share basis, but it was not rented the year before. I farmed it myself in 1913."

Q. You stated, Mr. Sims, that you were ready, able and willing to pay the full amount of your contract if the Company would deliver to you a water right or an interest sufficient to give you one-half miners' inch continuous flow per acre. Do you mean by that that you have the funds available at this time so that the payment could be made if that interest was tendered to you?

A. I don't mean that I have kept the money in the bank waiting to pay it at any time, but I can arrange promptly to pay it, and have been able at all times to have made these payments.

On re-direct examination, Mr. Sims testified as follows:

I made final proof on the whole 160 acres in July, 1913; subsequent to making final proof, Mr. Darlington and Mr. Hall told me that the company did not sell a permit or water right or agree to deliver one one-hundredth (1-100) of a cubic foot of water per acre per second of time under the contracts. I made personal proof in order to comply with the law and to get final certificate to my land.

Whereupon the following proceedings took place:

Q. And what induced you to make this final proof, upon what theory did you make it?

Mr. Haga: Oh, your Honor, we object to it as certainly irrelevant and immaterial.

The Court: I don't quite understand the purpose of this, anyway. The whole matter of going into final proof I don't understand the purpose of. Perhaps there is something in connection with the final proof which makes it material.

Mr. Longley: If the Court please, the statute seems to provide that at the time of making final proof the entryman must show by satisfactory testimony or evidence the ownership of a water right sufficient to reclaim all of the land entered upon. Now, we don't think it is material, either, but having been gone into on cross-examination, we don't want to be met by the proposition later on that at the time of making this proof the witness believed that he had such water right, without having an opportunity to explain why he believed he had such water right.

The Court: He may answer that.

The witness further testified:

Why, I made the proof to comply with the law, to get final certificate to my land. There was no special consideration that moved me to make the proof at that particular time.

The following proceedings then took place:

Q. At that time, what was the understanding under these contracts as to whether you had a permanent water right or not?

Mr. Haga: If the Court please, the question of permanent right does not enter into this at all. There

is no question but what the right they have is a permanent right. There is no such contention.

The Court: Gentlemen, I don't think I will let this proof go in in this form. If the final proof was referred to for the reason suggested by Mr. Longley, you will have to produce the statements which were made at that time and let the witness see them and ask him about them, et cetera. This will simply open the door to all sorts of inferences, which wouldn't be quite clear to the Court, to require me to pass upon matters of that kind. I think I will strike out the testimony in regard to the final proof.

Mr. Golden: Both on cross and direct?

The Court: Yes.

Mr. Golden: Very well, your Honor. That is all.

The Court: With leave to confront the witness, if you desire, with the statements that he made at the time, if they are inconsistent.

Mr. Haga: If the Court please, the question was asked on direct examination if he had made final proof, and he stated he did, and when he made it.

The Court: What would be the purpose or materiality of it?

Mr. Haga: It might have a bearing in different ways, your Honor.

The Court: What is the bearing?

Mr. Haga: In the first place, if we desire to produce the proof later and inquire about it—

The Court: What I want to know now is as to what you are asking the question for.

Mr. Haga: First, I want to know if he had made

final proof, so that I may take steps to get the final proof for that purpose.

The Court: If that is the only purpose, it may stand for that purpose and no other. It will be understood, gentlemen, that this was merely a preliminary question for the purpose of giving information to counsel.

On re-cross examination, Mr. Sims testified as follows:

I do not know what was the date of the issuance of the Circular No. 17, and I do not know when the person from whom I acquired my land made his entry nor whether it was on the opening day in June, 1908, or not. I acquired 80 acres from my father. I purchased an assignment for the other 80 from a man in the east whose name I think was Everetts. My father was an original entryman, but I do not know the day upon which he made his entry, and do not know whether he had ever seen the circular, No. 17, before he entered or not, neither do I know the day of the entry of the other 80 acres. I do not know whether the person from whom I purchased the other 80 acres has ever seen the circular, No. 17, or not. I had seen the circular No. 17 before I purchased the land from my father, but I know that I had never seen that particular copy before, or presume I had never, but had seen a similar form to that, that is, one from the same issue containing exactly the same matter and having exactly the same shape. I first saw this circular prior to the time I took the assignment to my land, which was in January or February, 1912."

A. E. CALDWELL, being called and first duly sworn as a witness for the complainants, testified as follows:

“My name is A. E. Caldwell. I am one of the parties plaintiff in this action and reside near Hollister, having worked my place for more than four years, which place contains 160 acres on the Salmon, where I now live. I secured this land in the fall of 1909 by purchase and went upon the land first in the fall of 1910, having improved it by clearing off the brush, moving off some of the rock, leveling, ditching and fencing part of it. I have some small buildings there—a stable, shack, granary, chicken house sheds, stock sheds, and the like. I do not know the approximate value of the improvements. I first cropped part of the land in 1911, about 85 acres. In 1912 I had 125 acres in crop; about the same in 1913. The reason I did not cultivate more is that about 29 acres and a fraction of highland are above the ditch and cannot be irrigated by the gravity system.

“I had talks with Mr. Darlington, an official of the Land and Water Company, relative to a water right at different times, but cannot state in what year. He told me that I had only a proportionate water right and not a water right as I considered I had in my contract. I have farmed my land myself and have continuously occupied the land since the fall of 1910, and all work has been done under my supervision. During 1912, the flow of the water was not steady nor continuous, and the irregularity at my place was very unsatisfactory. By regularity, I

mean that at the end of the ditch or lateral sometimes the water is entirely gone and at other times I have a fair lot of water. That condition would apply to the four years. I have never been consulted regarding the time or the manner of water deliveries upon that tract. As a contractor, I have asked for water, and sometimes I got it and sometimes I didn't, and I have never participated nor taken part in the determination of when water should be delivered to the irrigation system and have never been called upon to so participate that I remember. During the years of 1911 to 1914, the water received varied a great deal at my place, and I have never received $\frac{1}{2}$ inch per acre continuous flow for the entire season, nor the equivalent during the irrigation season. That condition is true as to all the years 1911 to 1914, inclusive."

On cross-examination, A. E. Caldwell testified as follows:

"I was not an original entryman, but purchased from Peter Madsen, and was familiar with the general method of delivery on the tract in 1912 and 1913, being there all the time. I do not know that I understood the general plan to be twenty on and ten days off, but it was that way part of the time, but I do not know that it was that way all of the time. I remember something about one year as to such being the plan, but can't say as to the year. I took my assignment of the land in 1909 and was in Twin Falls when I bought the land, but was not living there, my home being at Quincy, Ill. I saw

the land before I bought it. I met Peter Madsen in Twin Falls, where he was living at the time, before I made the purchase, which was made through an agent. I did not buy from the Twin Falls Salmon River Land and Water Co. I am president of the Water Users Association."

W. F. MIKESELL, being called and first duly sworn as a witness on behalf of complainants, testified as follows:

"My name is W. F. Mikesell. I reside near Twin Falls, Twin Falls county, and am a farmer, having been so engaged for four years, and am living upon the Salmon, operating a farm containing 160 acres under the Carey Act. I first went upon the land to reside permanently in April, 1911, and began to improve the land right away, but had done some clearing in the fall of 1910. I have cleared the whole 160 and have it all fenced and fairly well cross-fenced and have a small house and two other shacks that I have been using for hired men. I have a granary 12x64; I have a barn, a machine shed 14x135, and hog sheds and such things. I have been on the land continuously since 1911, and the farm work has been under my personal supervision. I think I am familiar with the water deliveries as made by the Land and Water Company, such deliveries having been irregular and insufficient, especially the first year—I say especially the first year. As for the remaining years, it has been insufficient; at no time has $\frac{1}{2}$ inch per acre continuous flow been delivered to me for the entire irrigation season from the first of April

to the first of November, nor the equivalent of such an amount. I have had all my land on the Salmon under cultivation during the various years I have been there.

"I have had a talk a number of times with Mr. Hall relative to the water right purchased by me under my water contract, but cannot say that I have talked to any other agent of the Land and Water Company, but may have talked to Mr. Darlington. I was not present at a meeting held several years ago in Hollister at which General Hays presided or at least attended. Mr. Hall and I have talked relative to this water right on most every point we could think of, and Mr. Hall and I don't agree. As I gather from his conversation, he doesn't think there is any specified amount or that we bought a specified amount in the contract, neither does he think that it requires as much water as I think it does. We talked of every phase of it, I guess. I don't think I discussed the question with Mr. Hall as to whether I purchased water under the contract or only a proportionate interest in the irrigation system, and don't know whether I discussed it with any other officer or agent of the Land and Water Company, but did discuss it with an attorney who had some connection with the Water Company. I don't know as he would be called an agent, however. In any event, I do not know of his agency but do know, however, that he has some connection or has done some work for the Company. I placed approximately \$10,000 worth of improvements on my land."

On cross-examination W. F. Mikesell testified as follows:

"I cleared and plowed most of my land in 1911 but put in no crop. In 1912 I had 160 acres in crop and had some other land leased and all of it in crop in 1913, and also in 1914."

On being asked when he first got his water in 1914, he testified:

"I think the first water I used, there was a run in the first part of May, I think, for the grasses; somewhere between the 15th of May and first of June, somewhere around there, I don't know exactly."

"In 1911 I had some beans and potatoes, but had mostly grain—100 acres of wheat, 25 acres of beans and 5 acres of potatoes, and the rest was in pasture. I did not use water the first time it was run because it was only for grasses and I had not sewed my pasture at that time. Because of different springs we have, I cannot say as to what time I ordinarily began irrigation of grain on my tract, but in 1914 it was between the 15th of May and the 1st of June. The 15th of May was all right although it was quite dry, still it would have been all right. The first water I used in 1914 was around the first of June. People desire usually to irrigate their grass lands before they do their grain, and that is the reason I used the expression 'grass run,' and that run was made for the purpose of irrigating grass. We were given the understanding that it was only to be used for alfalfa and clover, and it was a very small run, too. As a

matter of fact, people desire to irrigate their alfalfa and grass first and irrigate it earlier than they do their grain. I began the irrigation of my grain about the first of June just as soon as the water came on, but do not recall the exact date; and in 1914 we had practically a continuous run. I started in irrigating my 100 acres of grain but had about 240 acres of crop, having an additional eighty leased, and had three irrigators at work, including myself. I had one irrigator on the 160-acre tract continuously, and I was there the greater part of the time, and had one more on the eighty, but there were practically two men continuously on the 160-acre tract, but the one man on the 160 had no help excepting myself. It took us about 25 days to get over the hundred acres of wheat. We did not irrigate at night but stayed in the field until dark and got out just as early as we could see in the morning. I had a head and a half of water for irrigating my grain—by measurement 240-100 inches on the 160. I cannot reduce that to second feet, but the ditch rider told me that I was getting about a foot and a half usually, that is, about $1\frac{1}{2}$ second feet for the 160 acres. I used that head entirely in irrigating this 100 acres of wheat. My two men irrigated my 100 acres of wheat with that $1\frac{1}{2}$ second feet in from 21 to 25 days, but I do not know exactly how many days. I began irrigating my wheat the second time about fifteen days afterwards somewhere about the 10th of July. It took less time to irrigate it the second time, I think somewhere about fifteen days. With one man helping me

and with practically the same head of water, I only irrigated it twice and got a 26 bu. yield per acre. I had had the ground in wheat the year before this, being the third crop of wheat. I began harvesting it about the first of August. I don't recollect exactly, but the first of August is about the usual harvest time. I put a house and barn on my property in 1911 and a granary in 1912.

"Jos. E. Ferguson of Cripple Creek made the original entry. I purchased it from him in the fall of 1910, I think during the winter some time between 1910 and 1911. The water was on in 1914 practically continuously from the time I commenced to irrigate my grain. In 1913 I had about 140 of the 160 in wheat and the rest in potatoes and garden. There was only about five acres of potatoes. I have about six or seven acres that the lateral cuts off from my buildings and that was the second year that I had the ground in wheat. I don't recollect when I began irrigating my wheat in 1913—I think the latter part of May—I am not positive as to that. I had two men helping me irrigate my wheat all the time and part of the time I had three on the 160. I had another eighty at least that year but had another man working on it. I do not recollect whether I got water at the customary time in 1913 for the irrigation of wheat. I recollect 1912 quite distinctly, I think the first run in 1913 was for twenty or twenty-one days. The ditch rider told me I had a head of water of about one foot. I never kept any measurements. I am not personally familiar with the water measurements. I did not

get quite over my entire crop of 140 acres on that first run; I lacked about 10 acres of wheat. After that run I think the water was off for ten days. That is generally the system—generally the plan, that run. As I recall, they tried to establish a practice from the beginning of 20 days on and 10 days off, but it was not always practiced, however. The next run in 1913 was for fifteen or twenty days—I think it was fifteen, but do not know whether it was fifteen or twenty days, and cannot give the date when it was off, nor did I irrigate my wheat more than twice in 1913. As I ordinarily practice it, I irrigate wheat twice. I was supposed to have had one second foot head on the second run. It was very unsteady, however, both runs. I got over the wheat the second time at the expense of part of my other crop of potatoes which consisted of about five acres of potatoes. I had some alfalfa that year, but lost it—I did not get a stand. It was in the wheat, the wheat being used as a nurse crop, but there was only ten acres in alfalfa. I got fourteen bushels of wheat per acre that year. I did not measure what I got from the nurse crop outside of the other. It was all measured together, there being only ten acres of nurse crop which was just as good as the other.

“This was the first farming experience I had had in an irrigating country, but had farmed before, having been born and raised on a farm. But for ten years prior to coming to the Twin Falls country I had not been farming. I was a banker. I am a director of the Settlers Association.”

George Clyde Baldwin, being called and first duly sworn, as a witness for complainant, testified as follows:

"My name is George Clyde Baldwin. I am hydraulic engineer of the U. S. Geological Survey in charge of the water resources branch in the district of Idaho, and that district includes the county of Twin Falls. I have been so engaged in this particular position since July 1, 1911. It is one of my duties to measure the various streams in the territory I have referred to. I have taken measurements of the Salmon River which river the Board of Geographic Names has decided is the Salmon Falls Creek. The only measurement I have ever obtained in person was in 1910 but in co-operation with the Twin Falls Salmon River Land and Water Company—I believe that is the correct name of the company—and we have maintained a gauging station since the completion of the Salmon dam. That has been located above the backwater of the Salmon reservoir and below the mouth of Shoshone creek. That station has been maintained continuously at that location since some time during the latter part of 1910, I believe it is, I cannot tell exactly without looking it up; but prior to that time we had a station just above the dam and the old station was changed—was flooded out by backwater in the dam. The original station I think was established by the company, but the Geological Survey began its co-operative maintenance or really the assumed maintenance of the station, I think it was in co-operation with the company right straight

through, some time—let's see—I can tell the date of the year—in June, 1908, I believe was the first record. My department has taken measurements and made observations of the flow of this stream since that date.

“Our methods of measurement are two. First: Have a gauge of some sort on which the fluctuations in stage of the stream can be recorded. This gauge should preferably be located at a point in the stream where the relation between discharge and gauge height is as nearly as possible constant. This gauge is graded by obtaining current meter measurements, measurements with what is known as the Price type electric current meter, which is manufactured by W. & L. E. Gurley of Detroit. These measurements are made—from these measurements and the gauge heights at the time they are made, what is known as rating curves are platted. From these rating curves we take off what is known as a rating table, and this table is used to determine the actual discharge for each gauge height. Then the local observer obtains daily gauge readings, or, if it is an automatic gauge, of course a continuous record is obtained of all fluctuations in stage. Then by applying the mean daily gauge height to the rating table, we take out the mean daily discharge for each day; then these daily discharges are combined into mean monthly discharges and total run-offs for months, and for yearly periods. Our methods are, I think standard methods for handling the flow of large streams, and I think that, to the best of my knowledge they are the most

reliable which it is possible to obtain or which I know anything about, except you go to unreasonable and very great cost in constructing a weir or something of that kind. In recent years I know of the methods employed by the Land and Water Company in taking measurements of this stream, and within the last year or two the results obtained have been very close and have agreed very well with our measurements. It is my understanding that some of their measurements at early periods did not conform exactly with those handled by the Survey; of course, I am naturally a little partial to the Survey methods. I believe I know in what respects the Survey method and the Land and Water Company method differ, and they are as follows:

“Well I believe that they used what is known as the six-tenths depth method, that is, measuring the velocity at a point six-tenths of the total depth below the surface of the water, in most cases, where we would use what is known as the two-tenths and eight-tenths depth method, which is measuring the velocity at a point two-tenths of the depth below the surface and eight-tenths of the depth below the surface, and then taking the mean. Either of these methods are standard, but what is known as two-tenths or eight-tenths is generally considered to be a lot better, in cases where you have depth sufficient for that purpose. Another thing, in some of their earlier methods they used what is known as a standard cross-section, which is a cross-section determined by a level and rod. Now, in our work, we have found that unless

your stream is absolutely a solid rock bottom, that to use the standard cross-section is liable to introduce errors, because high stages of the stream, or even on low stages, the channel, unless it is absolutely solid rock, and sometimes even then, by a deposition of other material, may change a little bit. Of course, if that standard cross-section is checked up frequently enough it probably would be very good. But there is another point, where the bottom is composed of small boulders or coarse gravel, as I believe it is in the case of this particular station, to obtain a cross-section with a level rod you are apt to get depth a little too great; that is, the rod is apt to slide off the top of a rock and get down below, to boulders, and you would show a cross-section a little bit greater than would be the real mean if it was obtained by something with a little larger surface. Our method is to measure a cross-section at the time of each measurement. If it is a wading measurement, we use a rod with a little foot piece on it and try to get the mean cross-section by averaging the little drops and raises caused by irregularities of the bottom. And then we use what is called a torpedo weight on the bottom of the meter, and we sound with this weight on the line. That is a little bigger than the base of a rod, and I think that in many cases will give a little more closely the mean depth at any particular point, as it is not apt to sink down into a hole.

“We have compiled a plat or table showing the volume of water in the stream during the periods covered by our observations and have published rec-

ords for a number of years. They are not up to date in public form, but I have here a summary for the years beginning October 1st and ending October 1st, showing the runoff by months and years in acre feet."

Witness then indicated such table, whereupon it was marked plaintiff's "Exhibit No. 22," which is as follows:

Table 10. Plaintiff's Exhibit-No. 22.

MONTHLY RUNOFF OF SALMON FALLS CREEK BELOW LANDS OF UTAH CONSTRUCTION CO.

Quantities in Acre Feet.

MONTH	1908-09	1909-10	1910-11	1911-12	1912-13	1913-14	MEANS.
October		2,870	3,270	3,090	5,280	3,540	3,610
November		3,130	3,860	3,300	5,650	4,170	4,020
December		2,770	3,750	3,000	4,250	3,090	3,380
January		2,770	6,330	3,040	3,790	5,290	4,240
February		2,220	8,500	4,020	3,650	5,400	4,760
March		41,600	19,600	6,150	11,900	16,600	19,200
April		34,900	14,300	24,000	25,300	35,700	26,800
May		28,300	18,100	51,100	22,900	38,600	31,800
June	28,600	8,600	16,100	41,100	16,200	14,300	2,0900
July	5,100	24,50	3,360	8,180	5010	2,200	4,380
August	1,990	1,600	1,370	4,450	2,480	1,430	2,220
September	2,310	2,200	1,530	2,860	2010	1,710	2,100
YEAR	38,000	133,000	100,000	154,000	109,000	132,000	127,000

Daily Discharge May 29, 1910 to June 5, 1910 estimated at 272 second-feet. Discharge May 20, 1910 at Salmon Dam, 311 second-feet; discharge below Shoshone Creek, June 6, 1910 232 second feet.

Witness further testified as follows:

"Table No. 10, marked 'Plaintiff's Exhibit No. 22, is the table I referred to as making a showing of the monthly runoff of the Salmon Falls Creek and the book and page is a part of the records of our office. I can and will have made a true and correct copy of this table. By the yearly mean of 127,000 acre feet is meant that the years for which we have total records on the climatical basis begin with October 1, 1909, and there are six years, from Oct. 1, 1909—no, five years, it is—until September 30, 1914, for which there are complete or practically complete records. There may be gaps of a week or perhaps even a month in one or two instances, which have been estimated, in order to complete the totals. This 127,000 represents the totals of the means for each month since we have had records at these two stations. Now, in October, November, December, January, February, March, April and May, those means are for five years only, but for June, July, August and September they are for six years, because of the fact that the record started in June, 1909. I don't know but that once before I said 1908; if I did, that was a mistake; it is June, 1909. So these means for the different months are taken, and then they are summarized to obtain the mean yearly runoff for the period of record. The 127,000 acre feet is the general average from the records that we have available."

On cross-examination, Mr. George Clyde Baldwin testified as follows:

“In preparing my curve for the year 1910 I cannot tell how many points I had from which to prepare the curve without recourse to our records. I made one measurement in person some time in the spring of 1910—I cannot tell you exactly when. Then there were, I think two or three more measurements obtained during that year. I made measurements in the year 1914 to ascertain what amount of water was taken by the Vineyard Land and Stock Co. on its lands above. That is what this report is. This report is a result of that investigation which was made in co-operation with the State of Idaho and the Salmon Falls Land and Water Company, I guess, and the Utah Construction Company. The total for that year of 132,000 acre feet represents measurements taken below the diversion of the Vineyard Company. In 1914 the total net loss due to irrigation of Utah Construction Company land or lands of the old Vineyard Land and Stock Company computed by one method is 9,580 second feet, and there is some discrepancy due to different methods used but that is due to the introduction of error, due to time interval, but between nine and ten thousand acre feet I think would be probably as close as I could give that. The total runoff of Salmon Falls Creek below all these diversions and below tributaries during the period of this special investigation which was from May 16, 1914, until September 30, 1914, amounted to 39,240 acre feet. The total diversion by the Vineyard Company, or what is really the Utah Construction Company now, was 17,206 acre feet. The water

returned amounted to 1829 acre feet so that the net diversion was 15,377 feet. The unmeasured inflow on the lands of the Utah Construction Co. or the Vineyard Land and Stock Co. amounted to 5797 acre feet, and a net diversion less the unmeasured inflow, gives us 9580 acre feet net loss on the lands of this Construction Company. The unmeasured inflow on the lands of the Utah Construction Co. is really the difference between—(that is, the summation of all the supply), we measured all the streams above points of diversion and subtract the total diversions and make allowance for return water that could be measured; then we had this record down below, all points of irrigation, and the difference between that shows the unmeasured inflow—that is about the only way we can arrive at it. I measured the stream above and below and all the places where I could find that the return water could be measured. I have records over at the office showing the periods for which the flow was estimated instead of having an actual record of it, but there is one period from May 29, 1910, to June 5, 1910, that I can give. That was the time the lower station was flooded out by backwater and the shift was made to the station up above the reservoir. There is a gap of that period. Our records indicated that the discharge of May 28th down at the dam was 311 second feet, and the discharge at the upper station on June 6th was 232 so that we arbitrarily estimated the discharge throughout that period as 272, which is practically the mean of those two discharges at the terminals of this period. I

guess I can't tell you exactly but the measuring station from which we now measure is about 200 yards down the stream from the entrance of the canyon about one-half a mile—I guess below the mouth of Shoshone Creek. I do not know the distance well enough over there to approximate that. Anyone who knows the country over there would tell you probably better than I. The company and the Department have been co-operating ever since I have been in charge of the work, and I believe that the co-operation extended back to the time when the Survey first took up the work, but I don't know without looking up the records just to what extent they co-operated at that earlier period.”

On re-direct examination, George Clyde Baldwin testified as follows:

“There are some 17,000 odd acre feet diverted for the Vineyard Land and Stock Company or the Utah Construction Company, and that water is used to raise a little grain, but it is used mostly for the irrigation of meadow and wild hay. Some of their lands have been irrigated for a long period, but it is my understanding that they have gradually increased the acreage under irrigation and that probably last year represented the maximum acreage which they have irrigated at any time prior to that. I would not say that 1914 was the first year that the maximum acreage was irrigated, but I think there was probably a greater acreage of land to irrigate during 1914 than any year prior to that. I don't think that all land owned by this company susceptible of irriga-

tion has now been brought under irrigation. The Utah Construction Co. can irrigate additional acreage over what they have now if they have the water for it. I don't know close enough to make an estimate of the total number of acres susceptible of irrigation above the Salmon River project upon this stream, and do not know the number of acres under irrigation for the year 1914, but some 17,000 acre feet were put upon the lands of this company."

On re-cross examination, George Clyde Baldwin testified as follows:

"There are three groups of land that the Utah Construction Company irrigated. I think it lies almost wholly in the state of Nevada. Their irrigated lands begin at the mouth of the Shoshone Creek and extend southward into Nevada bordering on both Shoshone and on Salmon Falls Creek. The lands extend southward into the state of Nevada from the mouth of Shoshone Creek down to the Hubbard ranch, that is, up the stream, and if you call south down, it is down; I should say, roughly, it is 25 miles, but I can probably give you something more accurate than that if you want to know it here. I would not say that the lands of the Utah Construction Co. extend continuously for 25 miles upstream, but it borders the stream.

"There are three principal tracts of land—that around San Jacinto and that up around what is known as the Hubbard ranch tract, and then there is another on one Shoshone Creek. It is just irrigated in spots or places, and that might be classed

perhaps as a 'shoestring ranch,' although the lower end down around San Jacinto broadens out into quite a wide tract there. I do not know whether this is the property that was formerly the Sparks and Harrell ranch. It formerly belonged to the Vineyard Land and Stock Co., and the Utah Construction Co. took their holdings but I am not positive about the ownership prior to that time. It was used as a stock ranch and for cutting hay. I think some new ditches were taken out last year or the year before, and I presume that is the cause of the large diversion in 1914. That would be my idea that on account of these new ditches the diversion was the maximum last year over any time up to that period."

On a re-direct examination, George Clyde Baldwin testified as follows:

"I believe that the waters so diverted by this company in 1914 are now in litigation in this court but am not positive about that of course."

William J. Trueblood, being called and duly sworn as a witness for complainants, testified as follows:

"My name is William J. Trueblood. I reside on the Salmon Tract south of Twin Falls and have lived there since the spring of 1911. I am a farmer and have been so engaged all my life and am a land owner upon the Salmon River Tract. My land is the NE $\frac{1}{4}$ of Sec. 4, Tp. 11, Range 16. I am the owner and holder of a water contract with the Twin Falls Salmon River Land and Water Company and secured the contract in the spring of 1911 or summer. I remember when the project was thrown open to entry

and was living at that time in Twin Falls or just adjacent to the town, and was selling milk at the time. I was on a milk wagon. I was present at the opening of this project.

"There was some discussion, or rather a public discussion that I heard relative to contracts or matters connected with the opening. By the 'opening' I mean a crowd was collected at the square where they were holding the drawing and this discussion was taking place. I could not state who the parties were that were discussing the matter of water rights. I was not acquainted with them at that time. I was simply an onlooker and was not particularly interested at that time in the Salmon River lands. I think there was someone there representing the Salmon River Land and Water Company but I do not know the parties. It was after this time I purchased or secured my water right. That was in the spring of 1911 by purchase. I was on the land before I secured title in March, 1911. It was in the summer that I commenced improving it. My son commenced improving it in the spring early in 1911. I have made good improvements, built a good farm dwelling, a good barn, and orchard, fenced and cross-fenced a pasture, and such things that go to make up a good farm home. It is practically all under cultivation at this time, except about four acres that are cut off by an old electric line; I think that is above the gravity flow anyway. The improvements are worth from seven to eight thousand dollars.

"The operation of this farm has been under my

personal supervision and control. I remember when water was first delivered out there. It was in June, 1911—the 17th day of June, the water came to my place. Water has not been delivered to me at the rate of $\frac{1}{2}$ inch per acre continuous flow from April 1st to November 1st during either 1911 or 1912 or 1913 or 1914, or in any year. I have discussed the matter of my water right with Mr. Darlington a time or two, and it was discussed in a general way at a certain meeting in Hollister on the 8th day of June, 1912. Mr. MacWatters was there representing the company with a proposition, and Mr. Hays was also present. My understanding was that Mr. MacWatters was at that time General Manager of the Land and Water Company and I understood that Mr. Hays was attorney of the company. Mr. MacWatters did not say anything about the water right as I remember particularly, but Mr. Hays discussed the water rights. In an after meeting a number of settlers brought up the question to Mr. Hays, and I am not sure but I think Mr. MacWatters was present, but anyway Mr. Hays made the assertion that they sold us simply an interest in some ditches in the Construction Company, and also said they didn't sell us any water right—that was the sum and substance at least of the words. I personally informed Mr. Hays as he was leaving the building that I would not pay any water installments whatever under those conditions except he got it from me by the courts. I have been ready and willing at all times and have been prepared to make payments, assuming that I received a water

right, and I told Mr. Hays that I was willing to make my payments if I had assurance of water."

On cross-examination, Mr. William J. Trueblood testified as follows:

"I don't know as I could tell you the exact dates I received water in the various years. The first year I know it was in June. I ain't sure, but I think it was the third of May, 1914, that I first received water. We had a very fair head to start in with—I think it was running about 70 corrugations."

The question was asked, "How many acres did you have in cultivation," whereupon the following proceedings were had:

Mr. Golden: We object to that as immaterial and improper on cross-examination.

Mr. Hays: I am trying to determine the amount of water we had, if your Honor please.

The Court: You make him your own witness in going into this matter. It is not cross-examination.

Mr. Hays: If the Court please, I want to get the line as to cross-examination with this witness defined a little better. They asked him whether he had received a certain head of water.

Mr. Golden: Not "head," General.

Mr. Hays: They asked him if he received a certain amount of water, 1-100 or $\frac{1}{2}$ of 1-100 per acre continuously, and I am now inquiring what head he did receive and for what time, and in order to determine the head I am asking about the acres he had in cultivation.

The Court: Well, if that is the purpose of it—I had supposed that it was admitted you were not furnishing water continuously.

Mr. Hays: That was covered by the stipulation made at the beginning.

The Court: Then why go into this at all?

Mr. Hays: They had gotten into it, and we desired to show what conditions really were upon that point, as to the time and amount of the delivery and method.

Mr. Longley: Of course, if the Court please, if we go into this matter, it adds nothing to the stipulation.

Mr. Hays: It does explain it, however.

The Court: Well, I think I will let him go into it, inasmuch as you asked the question on direct examination. I had overlooked that. It didn't strike me as being important, and I don't know why you should stipulate the fact and then spend so much time in going into it in the testimony of the witnesses. Proceed.

Whereupon the witness testified as follows:

'In 1914 I had 80 acres entirely in cultivation, but the west eighty I did not have control of because I had given an option. I haven't bought any more land within the last year. By a fair head of water I mean on the Salmon a head of water from what we were used to using on the Twin Falls Tract, and there we used 50 inches of water, or whatever is customary for eighty acres, and I was used to that head, and,

therefore, I bring it as a comparison on the Salmon. I judge we had a 50 inch head or a second foot.

"I bought my land after final proof had been made, but it was Carey Act land. I did not buy it from the Twin Falls Salmon River Land and Water Company. I assumed or bought the contracts for water from that Company, which contract for water had been made by my predecessor in interest. I moved on the Twin Falls Tract in the spring of 1907. In 1907, 1908, 1909 and 1910, before I made the purchase of the Salmon Tract I was in the milk business part of the time with farming in between times. I bought the land in June or July, 1911, from my son who was living on the land at that time. The majority of the improvements I put on the land myself and they have been put on from year to year, but the greater bulk was made, I judge, in the last three years. I am not a director of the Water Users Association but was at one time."

Whereupon the following proceedings were had:

Mr. Golden: I understand that the defendants have conceded that all of this land is dry and arid and requires the artificial use of water before crops can be raised on it. You deny that, Mr. Haga, in your answer, and that is the reason I ask the question.

Mr. Haga: I assume that it is Carey Act land and comes within the requirements of the law.

Mr. Golden: There is no harm in stipulating that, is there then, Mr. Haga?

Mr. Haga: That it is arid in character as re-

quired under the Carey Act law for the segregation of such lands from the public domain.

Mr. Golden: And requires the artificial use of water before crops can be raised on it.

Mr. Haga: Well, there is some dry farming in the neighborhood, I understand.

Mr. Golden: I would like to offer in evidence copies of the trust deed; copy of assignment of the water contracts, to A. C. Robinson which were stipulated before. Is there any objection to that?

Mr. Haga: No objection.

Mr. Longley: I would like to know, Mr. Haga, unless you will stipulate, if you are attempting to collect the payments due under these contracts.

Mr. Haga: I will stipulate that it is the intention of the trustee to collect so far as it can the payments under the water contracts deposited with the trustees as security for the payment of the bonds.

Mr. Longley: And are now attempting by at least two foreclosure suits in this court?

Mr. Haga: Yes, and others in contemplation.

Whereupon complainants rested.

E. B. Darlington heretofore duly sworn being recalled as a witness for defendants, testified as follows:

I am an engineer by occupation. I have been engaged in civil engineering since 1898. I started irrigation work in the State Engineer's office in 1903. I worked a year in the Reclamation Service and have been six years on this project, including the period of

construction. I have had occasion to observe the action of the system and use of water on the project during those years; that has been my business.

The system is a storage project depending upon the stored flow of the Salmon River which is impounded behind a large dam 230 ft. high of concrete masonry construction. It is 450 ft. in length on top and about 16 ft. wide. Its width is 110 ft. at the bottom. Defendant's exhibit No. 2 is a picture of the dam. The dam backs the water up the canyon of the Salmon River, and at a maximum stage it would extend back about sixteen miles, varying in width from a quarter of a mile to perhaps nearly a mile. It has a storage capacity of something like 185,000 acre feet, that is available for drawing out. The general outline of the reservoir is comparatively long and narrow, and the water is deep as compared with a good many other reservoirs. The water is drawn through a tunnel at a height of about 85 ft. below the top of the dam. The water below the tunnel is not available for irrigation. Up to that point the purpose of the dam is to divert water; above that, its purpose is to store water. It is capable of impounding approximately 185,000 acre feet above the tunnel. The tunnel is a little over 11 ft. square. The first tunnel is 1300 ft. long and the second tunnel 2200 ft. long, both of the size mentioned. Between the tunnels is an open cut. The main canal is 60 ft. wide. The water goes through the two tunnels and into a little lake or check basin for checking the velocity of the water coming from the tunnels, and is then taken through into the canal system.

The main canal is 60 ft. wide on the bottom; has a maximum depth of about 5 ft., and a capacity of 1000 second feet. The canal up to the first diversion has a capacity of 1200 second feet, beyond that a capacity of 1000 second feet. The main canal continues for about ten miles and is divided into two main laterals, each with a capacity of about 500 second feet. The main laterals are then subdivided into smaller laterals and are again subdivided until the whole project is served.

The character of the construction is exceptionally good. The system is well and carefully built, located by careful surveys, built under strict specifications. The structures have always been considered by engineers to be first class in every particular. They are made of concrete and steel, reinforced concrete.

The Company has records showing the runoff of the Salmon river watershed for the years 1908, 1909, 1910, 1911, 1912, 1913 and 1914. Prior to 1911 Mr. Newell had charge of the records. For 1908 there was a runoff of 121,265 acre feet; 1909, 131,951 acre feet; 1910, 148,683 acre feet; 1911, 96,571 acre feet; 1912, 169,888 acre feet; 1913, 108,405 acre feet; and for 1914, 135,295 acre feet. The average for the seven years is 130,322 acre feet. This is for the calendar year beginning January 1st. That does not include the water diverted in 1914 by the Vineyard Land and Stock Company or the Utah Construction Company above our works. I am familiar with the development of those companies above our works. That was taken out above our measuring station.

Q. What amount of land did they have in cultivation at the time when we began construction?

Mr. Longley: That is objected to as being immaterial.

The Court: Apparently it is a material matter to know what the rights of that Company are. I am not sure that it will do very much good to just sort of skim over it. It may be that ultimately it will be an important matter to know what the rights of this Company may be, for they very much modify the rights of the Salmon River Company.

Mr. Hays: The Salmon River case itself is set for hearing on the 20th of this month, and we expect to try out the issues between those parties at that time.

The Court: It would seem to me, gentlemen, that about as far as you could go at this time with any success would be to show the amount of water that is thus diverted. I cannot try out here the issues without the presence of those parties. It may be ultimately that a decree in this case should be withheld until I reach a conclusion in the other case. On further reflection I think it would be better not to go into the matter fully at the present time.

Mr. Hays: Mr. Longley, is there any objection if that should, in the judgment of the Court, cut any figure here, as to the exact amount, that the judgment of the Court be withheld until the decision in that case on the 20th.

Mr. Longley: I take that as a matter for the Court to pass upon. I have nothing to say about it.

Q. These lands of the Vineyard Land and Stock Company, where are they situated?

A. They are in Nevada. The valley opens about twenty miles above the dam, and that extends about fifteen miles up the river in varying widths. The gauging station of the Geological Survey is about twenty miles above the dam, at the lower end of the Vineyard Land and Stock Company's holdings.

Q. Can you give us, Mr. Darlington, first, what is the action of reservoirs ordinarily with respect to the loss of water, if you know. I mean by that, what were the losses in the beginning and later on. Are there any changes?

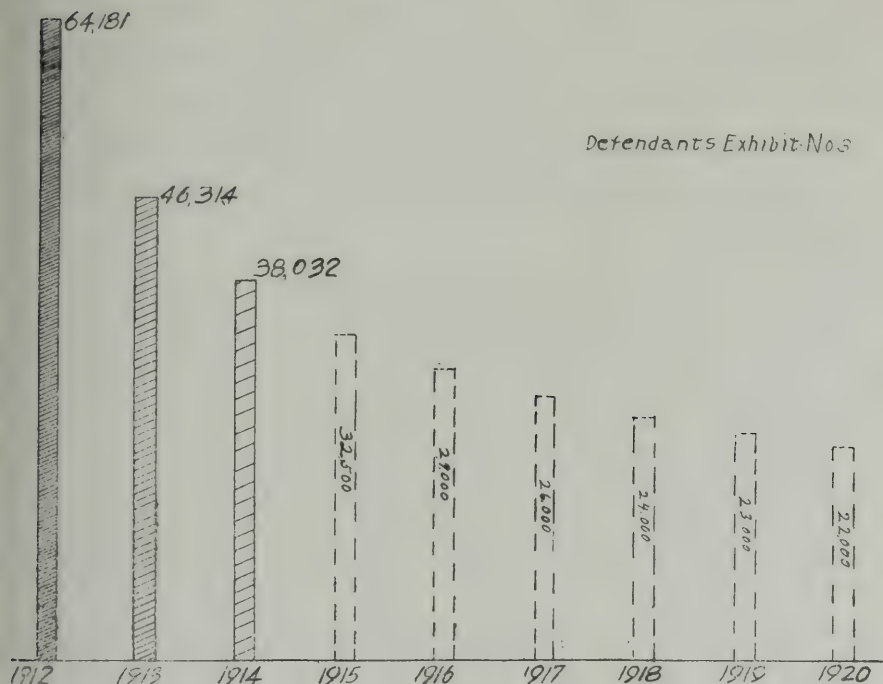
A. In my observation and experience, it is indicated that the losses are decreasing with the use of the reservoir, that they were very much larger in the beginning. The water rising in the reservoir has a puddling action. The bed becomes saturated. The sides become saturated further out each year, a little, and then as the reservoir drops down each year, some of that comes back. There is more or less return flow after a year's use. This diagram I have indicates the loss each year in acre feet for the years 1912, 1913 and 1914. The dotted lines indicate what may be expected in future, judging from the records of the past. That is, of course, problematical, but the record indicates a gradual increase in the efficiency of the reservoir.

The two items which make up reservoir losses are percolation and evaporation. The evaporation loss is practically constant. The percolation or seepage

loss is the one that is the changing factor. It reduces as the age increases.

(Defendants' Exhibit No. 3 was introduced in evidence and is the following diagram, to-wit:)

LOSS IN RESERVOIR IN ACRE FEET



Q. What would you say, Mr. Darlington, from your experience of this reservoir, and your study of the subject, as to how many acre feet the ultimate losses in the reservoir would amount to?

A. Of course, that is problematical, but from observation and study of it, I would think the ultimate losses would come down to perhaps 15,000 acre feet.

Q. What part of that would be the evaporation loss?

A. About half of that would be evaporation loss.

Q. And the other half would be the seepage loss?

A. The experience of a good many reservoirs seems to be that the ultimate losses come down to about twice the evaporation loss. That has been the history of a great many reservoirs. The mean submerged area of the reservoir is about 2000 acres.

Q. Then the percolation or seepage loss would be the seepage loss as you have estimated it of 7500 acre feet occurring over an area of approximately 2000 acres?

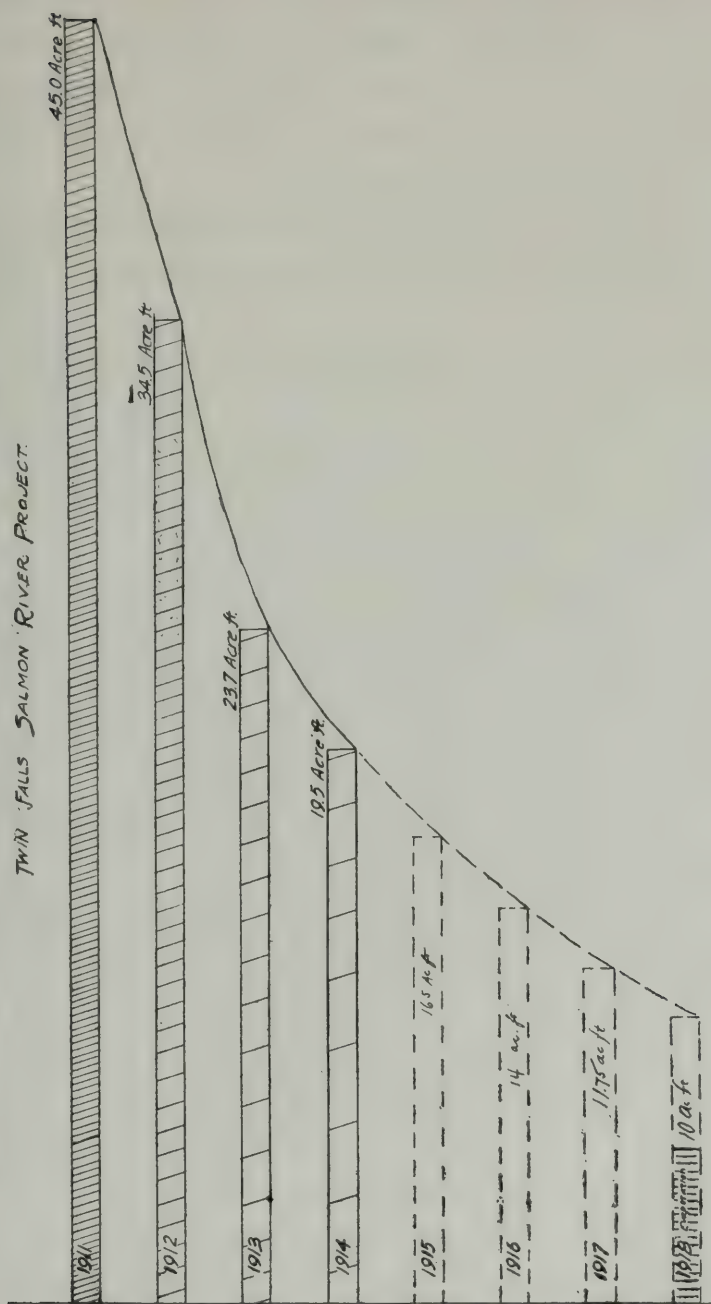
A. Well, the acre foot loss would occur over the reservoir at any stage; that would be a depth of something like $7\frac{1}{2}$ feet on an exposure of 2000 acres, that is, the total loss. I have here a diagram that shows the losses in depth on a mean submerged area. It shows the losses in acre feet on that area. In 1911 the loss was 45 ft. in depth, on each acre of mean submerged area. In 1912, it was $34\frac{1}{2}$ feet; in 1913, 23.7 feet; in 1914, $19\frac{1}{2}$ feet. The dotted line indicates what possibly we may expect in the future.

(Diagram Exhibit No. 4 introduced in evidence.)

RESERVOIR LOSSES PER SUBMERGED ACRE.

TWIN FALLS SALMON RIVER PROJECT.

Defendants Exhibit No. 4



In my opinion, however, the losses won't go down as far as that chart indicates. That goes down to the evaporation loss. In my opinion, the losses will not go down below twice the evaporation loss. That is, below the 15-foot point.

Q. Mr. Darlington, in your judgment, how soon would it get down to the fifteen-foot point, about what year?

A. I think you misunderstood me on the fifteen-foot point. It would be down to the ten-acre foot point on the mean submerged area, that would be about 15,000 acre feet, however.

Q. Yes, I misunderstood you.

A. Say we would have a total loss of ten feet in depth on the mean submerged area, and establishing this curve through the points we already have, and extending it, we would get down to that in about 1918. Of course, that is problematical.

(Diagram objected to in so far as it was justified by the opinion of the witness.)

Mr. Hays: It is simply an illustrative diagram, if the Court please. He has given the data.

Mr. Longley: As I understood the answer of the witness, he said in certain portions of the data the loss in his opinion would not conform to the diagram.

The Court: I think I shall sustain the objection and require the witness to remove that part of the diagram which he says is not in conformity with his judgment. I don't know why a diagram should be made in this way.

Mr. Hays: Mr. Darlington, will you please see that the diagram is corrected in conformity with your views?

Witness: Yes, sir.

Q. I call your attention, Mr. Darlington, to the irrigation system itself. Can you tell what the percentage of loss in the irrigation system has been for various years?

A. I can tell approximately what they were for 1911 and 1912, and definitely what they were for 1913 and 1914. The percentage of loss in 1911 was 70% of the quantity discharged at the dam. We had not definite measurements at the farmers' headgates that year nor the following years to determine accurately the amounts delivered to the farmers, and that is an estimate made up from the estimates of the ditch riders as to the delivery to the farmers and deducted from the total amount measured out at the dam. That is the percentage of losses in the canal system compared with the discharge at the head, at the dam, into the canal. We discharge a certain amount into our system and deduct the amount that we actually deliver to the farmers, and the balance is considered loss. In 1911 the total discharge at the dam was 22,843 acre feet. The estimated deliveries were about 6500 acre feet. They were not measured.

In 1912 the total discharge at the dam was 62,827 acre feet, the estimated delivery about 31,000 acre feet. In 1913, weirs were installed and the measurements taken at the farmers' headgates, and the total

deliveries were about 73,000 acre feet for irrigation. The total deliveries were 50,175 acre feet measured at the farmers' headgates. The water for domestic purposes and stock use was not measured. In 1914 the total amount used for irrigation was 103,000 acre feet measured at the dam. The amount delivered to the farmers at the farmers' headgates was 73,933 acre feet and 800 acre feet delivered to the Deep Creek Co.; that made about 74,700 acre feet. The evaporation on the surface of the reservoir is probably about 54 inches. We have no measurements on the reservoir, but that is the record of evaporation made by Don Bark under similar circumstances. My opinion is that the total losses will be twice the evaporation loss. That is, the seepage loss and evaporation losses will approximately equal each other. Defendants' Exhibit No. 4 illustrates the curve showing future improvement as near as we can tell from the records that we have. The percolation loss in the canal, when it is carrying water at various distances, is in proportion to the area covered by the water, and not in proportion to the percentage per mile, as is often indicated. For instance, take a canal of 10 ft. bottom width, with a foot of water and a foot of length, that will cover about fourteen square feet, and we have determined the losses to be about 9-10 of a cubic foot per day per square foot of area wet. If we assume that loss and a wet area of $14\frac{1}{2}$ sq. ft. per foot of depth, then we would have a percolation loss in that section one foot long, of 13 cu. ft. per day, and a discharge in the canal of say fifteen second

feet. If we assume it two feet deep, we would have a wet area there of 19 sq. ft. and a percolation loss of 17 cu. ft. per day, with a discharge of 66 second feet. Assume it three feet deep, and we would have a percolation loss of 21 cu. ft. per day and a discharge of 142 second feet, for that section, so that there can be no comparison between the amount of water carried and the loss. It is the area exposed that is the element that determined the loss. The water surface alone will determine the evaporation loss.

For what is known as the "A" system we turned in 19,277 acre feet in the year 1914. The number of acre feet used by the farmers was 14,227. The number of acres irrigated was 6,831; the transmission loss for the season was 5,049 acre feet, that is 26% of the water turned in. Under what is known as the eastern section, 13,810 acres were irrigated in 1914 and 37,078 acre feet of water delivered to that system, and 35,348 acre feet turned out to the farmers. The loss was 1730 acre feet. The percentage was about 4%. Under what is known as the central section of the system, 5123 acres were irrigated during that year and 15,980 acre feet delivered to that part of the system and 13,701 acre feet used or turned out to the farmers. The amount lost was 2279 acre feet, which is 14.3% of the amount diverted. In what is known as the western section, 3768 acres were irrigated, and 13,350 acre feet diverted for that section. Of this 9,256 acre feet were used. The loss was 4,094 acre feet, which is 30.6% of the amount diverted for that section.

That part of the country is very sparsely settled, and the water that is carried out there is very shallow in the ditches, and consequently a large area of ditch section is exposed in proportion to the acreage served. That is one cause of loss. Another cause is that the system is very long and sinuous, and perhaps the percolation in that section of the tract is a little abnormal. The percentage in the southern section is 26%. The reason is that it is close to the dam. There is no silt carried from the dam into that part of the canal. No water drains into it from any other system. It is high, the high line of the system. The soil is a little more gravelly than the other part of the system. We have considered the question of eliminating the western section altogether. The change would take place by cutting it off about where the cross is marked. The plan would be to extend another lateral a little further around the hill and cover the same territory now covered by the long lateral. I am speaking of the western section. The check basin is a small lake at the outlet of the tunnels. Its purpose is to check up the velocity of the water coming from the tunnels and to give a little elasticity in the operation of the system. It is under consideration to eliminate that and construct a ditch around it. The area of the check basin is about 80 acres. The losses in the check basin are about nine tenths of an acre foot per day per acre. Based on an area of 90 acres and a proposed area of the ditch line proposed, about ten acres, we would save an exposure of about eighty acres there. Eighty acres at nine-

tenths of an acre foot per day would be about 70 acre feet per day that we would save. That would be a flow of about 35 second feet. It is our idea that a ditch around this check basin would reduce that.

Cross-examination by Mr. Longley:

Q. Mr. Darlington, let me first inquire if, in giving your opinion as to the ultimate loss in transmission, you have taken into consideration these proposed improvements?

A. No. In that estimate I gave I hadn't considered the improvements.

Q. At all?

A. No.

Q. So that the improvements didn't enter into your opinion heretofore given in your testimony?

A. No.

Q. Now, you have acted as the chief engineer of this Land and Water Company up to the present time?

A. Yes, for the last four years.

Q. And have recently certified as to the completion of the system, or what is the fact concerning that?

A. I certified as to the completion about two years ago.

Q. Have you recently certified as to its completion?

A. Yes, I believe so.

Q. And in the certificate did you make any mention of the fact that this check basin was losing prac-

tically 70 acre feet per day, or a saving of that much, rather, could be made by constructing a proper ditch or canal?

A. No.

Q. Yet these check basin losses have continued and been present each of the years of the operation of the system?

A. Yes, they have been present. They are improving, though.

Q. Can you give the losses for 1912 and 1913?

A. No, I haven't them at hand.

Q. What would you say as to these losses being excessive and unusual, or just ordinary losses, as concerns this check basin?

A. The losses in the check basin are very moderate for the area exposed.

Q. How many miles of main canal, insofar as evaporation and seepage are concerned, would be the equivalent of the check basin?

A. The present length of the main canal exposes just about the same area as the check basin.

Q. And the length of the main canal is what?

A. Eleven miles.

Q. So that in eleven miles of main canal you only lose the amount of water lost in this check basin?

A. Yes.

Q. And what length of canal would be required to pass the water through or around this check basin?

A. About 4,200 feet.

Q. Less than a mile?

A. Yes.

Q. Your certificate was that the system was completed in a good and workmanlike manner, or have you a copy of that certificate?

A. I don't remember the terms of the certificate now.

Q. You don't remember anything about that?

A. No, I don't remember that.

The witness further testified:

The difference to be found in the method of our measurements of the flow of the stream and the Geological Survey is found both in the projecting of the rating curve and in the actual measurements taken. We take our measurements a great many more times during the year than they take theirs. River stream measurements depends upon the factors of the velocity of the current and the depth of the reading, the sounding of the stream. The Geological Survey makes but about two or three soundings through the season. We make a sounding at every measurement, at the end of every month, and a rating, at the same time, and we have a great many more points on our curve, to determine that curve. For that reason I have always been of the opinion that our curve was more accurate. I know of a reservoir a good deal similar to ours, the Goose Creek reservoir, and while the sides of the reservoir are not altogether similar, are practically similar.. I don't

know the amount of water stored in the Goose Creek reservoir, or the percentage of loss. At the Salmon dam, the lava rock is exposed and extends back from the dam along the sides of the reservoir for a quarter or a half mile. There has been some leakage back into the canyon from the tunnel leading from the reservoir. I cannot say as to what that loss was due to. Aside from the Goose Creek reservoir, I do not know of any other reservoir in the world having lava rock sides or other soil or geological characteristics similar to those found at the Salmon dam. The Oakley reservoir has been operated two years and the Salmon has been operated longer than that.

Re-direct examination:

Now the difference in elevation of this tract from the north end to the south end is about 1000 ft., and the elevation of the north end is about 4000 ft., and of the south end about 5000, with some little difference in climate. The elevation of the reservoir is about 5000 ft.

There is some water in the stream below the dam, but we can give no measurement except one taken with the State Engineer, when we found $4\frac{1}{2}$ second feet running at that time. Last year a number of gauge readings were taken showing the flow to be decreasing. This dam diverts the entire flow of the stream. I do not know of any unusual features about this reservoir which would affect the loss by seepage. In the western section the loss was due to some extent to the fact that there were only a few farms being irrigated. Contracts are out for the

land under that portion of the system on which water is not being used, a large part of the territory being held by people who do not use the water or cultivate their property. This section has not developed as rapidly as the balance of the system.

Re-cross examination:

At the close of the season of 1914 we had in the reservoir something like 16,500 acre feet and through the summer 800 acre feet were delivered to the Deep Creek Company, and the lands of that company on which this delivery was made are not included within our water contracts, and the water so delivered to this company would have been available for distribution.

Re-direct examination:

In figuring the length of time which it would take to use the water that would be in the reservoir on the first of May, delivering it on the basis assumed by counsel in his question, of one-half miner's inch per acre, I took into consideration the entire season's loss for the reason that it was the assumption made by counsel. I did not take out the loss for the period that it took to deliver the water. I took it for the whole season. Those conditions would not apply to the conditions that actually obtain in the distribution of water. Those figures are of no practical value in this matter.

Re-cross examination:

I simply took the assumptions made in the questions and responded to them in my figures yesterday.

(At this point discussion occurred as to the facts on which the witness' answer was based. It was understood that Mr. Longley would write out the question and present it to the witness and that he would thereafter answer it, as it took some time to make the necessary computations.)

And thereafter the witness was again called to the stand in relation to this matter and thereupon he submitted the following written answer, which was marked Plaintiff's Exhibit No. 23, and is in words and figures following, to-wit:

PLAINTIFF'S EXHIBIT NO. 23.

1st Question:

Assuming that there is 25,000 acre feet in the reservoir on March 28th; that the river should flow the same quantity as in 1914; that the reservoir and canal losses be the same as in 1914; that the full project, viz., 73,000 acres, should require water; that the delivery should commence May 1st; that 1-100 of a second foot be delivered per acre, how many days would elapse before the reservoir would be empty (to the tunnel lever)?

Answer:

25,000 acre feet—March 28th.

1,560 Run-off to Apr. 1st.

26,560

70 Loss to April 1st.

26,490 Storage April 1st.

39,128 Run-off in April.

65,618

8,283	Loss in April.
<hr/>	
57,335	Storage May 1st.
39,928	Run-off in May.
<hr/>	
97,263	
9,014	Losses in May.
<hr/>	
88,249	
62,248	Drawn off in May.
<hr/>	
26,001	Storage June 1st.
11,420	Run-off to June 17th.
<hr/>	
37,421	
2,940	Losses to June 17th=17-30 of 5199.
<hr/>	
34,481	
34,136	Drawn off to June 17=17x2008.

73,000 acres, served at the rate of one second foot per 100 acres, would require a head of 730 second feet, or 1,460 acre feet per day. To provide for canal losses at the rate of 27.3% of total diversion, it would be necessary to turn out 1460-0.727 acre feet per day, or 2008 acre feet per day.

2nd Question:

Same assumption, except that $2\frac{3}{4}$ acre feet per acre be delivered at the rate of 1-100 of a second foot per acre, how many acres could be supplied?

Answer:

To deliver $2\frac{3}{4}$ acre feet on one acre would require a continuous flow of 1-100 of a second foot for 137.5 days.

137.5 days from May 1st equals September 15th.

26,560 Storage Apr. 1st.

39,128 Run-off for April.

39,928 Run-off for May.

14,401 Run-off for June.

2,015 Run-off for July.

1,312 Run-off for Aug.

530 Run-off to Sept. 15th.

123,874

Deduct losses—29,385 acre feet.

94,489 acre feet available for use.

Losses.

70 Loss for March.

8,283 Loss for April.

9,014 Loss for May.

5,199 Loss for June.

2,602 Loss for July.

3,212 Loss for August.

1,005 Loss to Sept. 15th.

29,385

At rate of $2\frac{3}{4}$ acre feet delivered at reservoir,
34,500 acres could be supplied.

At rate of $2\frac{3}{4}$ acre feet delivered at land with
canal losses of 27.3%, 25,100 acres could be supplied.

Answer (2nd part) :

25,000 acre feet, March 28th.

1,560 Run-off to Apr. 1st.

39,128 April run-off.

39,928 May run-off.

14,401 June run-off.
2,015 July run-off.
1,312 August run-off.
530 to Sept. 15th.

123,874 acre feet.

Deduct losses— 6,995 acre feet.

116,879 acre feet available.

Losses.

120 March.
1,250 April.
1,250 May.
1,250 June.
1,250 July.
1,250 August.
625 to Sept. 15th.

6,995

With 116,879 acre feet available, and deliveries at the rate of $2\frac{3}{4}$ acre feet per acre on the land, and canal losses of 15% of total diversions, 36,185 acres could be irrigated.

With 116,879 acre feet available, and deliveries at the rate of $2\frac{3}{4}$ acre feet per acre at the reservoir, 42,500 acres could be irrigated.

3rd Question:

Same assumptions, except that reservoir and canal losses be assumed at what you have testified they will ultimately be?

Answer (1st part):

25,000 acre feet March 28th.

1,560 acre feet run-off to April 1st.

26,560

120 Loss to April 1st.

26,440 Storage, April 1st.

39,128 Run-off in April.

65,568

1,250 Loss in April.

64,318 Storage, May 1st.

39,928 Run-off in May.

104,246

1,250 Loss in May.

102,996

53,258 Drawn off in May.

49,738 Storage, June 1st.

14,401 Run-off in June.

64,139

1,250 Loss in June.

62,889

51,540 Drawn off in June.

11,349 Storage July 1st.

274 Run-off to July 6th.

11,623

240 Loss to July 6th.

11,383

10,308 Drawn off to July 6th.

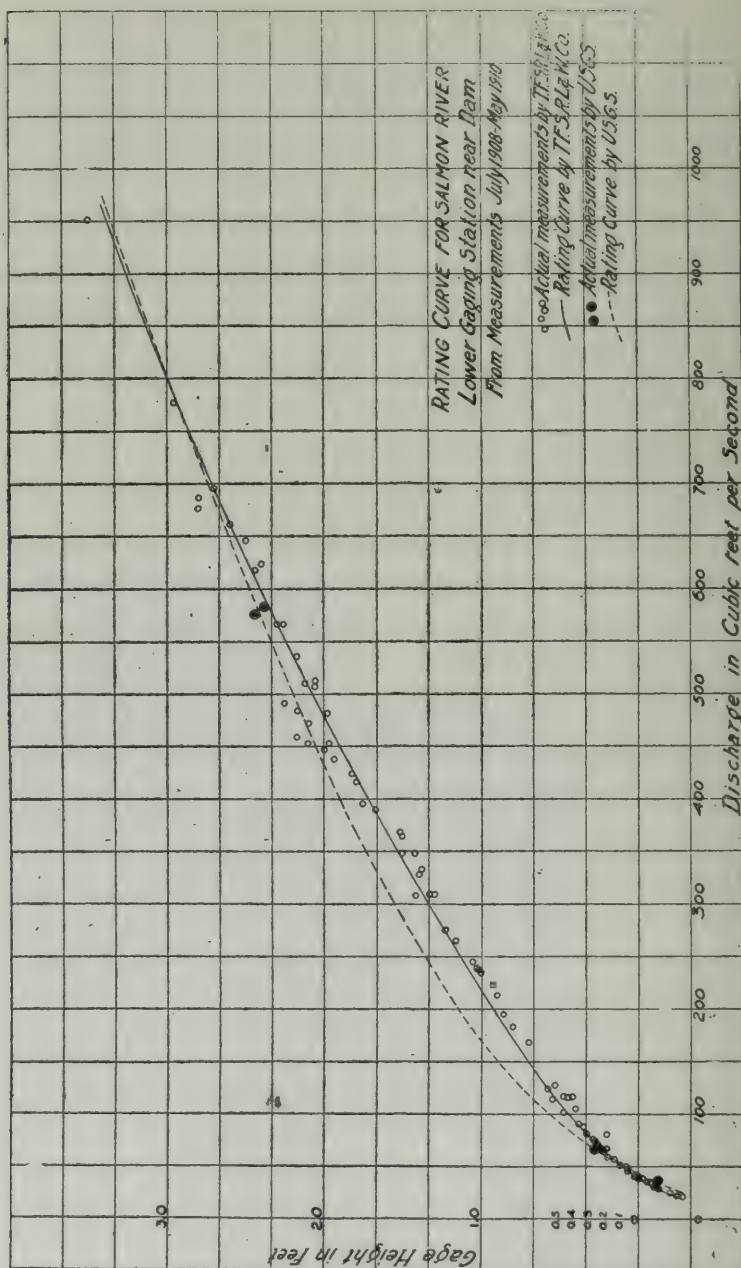
1,075

Head of 730 second feet would have to be increased to 859 second feet to provide for 15% canal losses, equals 1,718 acre feet per day.

R. J. NEWELL, being called and first duly sworn as a witness for defendants, testified as follows:

The method of making rating curves by the Government and by the Company showing the runoff of the Salmon River is just the same. The Government rating curve for the station on Salmon Project, however, is based on five measurements, while the Company curve is based on ninety-four measurements. That is the reason for the difference between the amount of water from June 1, 1909, to September 30, 1910, which is 17,500 acre feet, as shown by the charts, defendants' exhibits 12 and 13, which exhibits are as follows:

Defendant's Exhibit No. 12.



DEFENDANT'S EXHIBIT NO. 13.

Monthly Runoff of Salmon Falls Creek Below Lands of Utah Construction Company.

Month.	Quantities in acre feet.					
	1908-09	1909-10	1910-11	1911-12	1912-13	1913-14
October .....	.....	2,830	3,530	3,250	5,630	4,080
November .....	.....	4,040	4,190	3,480	5,700	4,400
December .....	.....	5,170	4,470	3,120	4,700	3,740
January .....	.....	4,160	7,570	3,200	3,980	5,390
February .....	.....	5,400	9,440	4,240	3,970	5,440
March .....	.....	43,700	18,930	5,950	11,960	16,830
April .....	.....	36,390	13,040	23,390	25,950	39,190
May .....	.....	30,770	15,930	54,910	23,170	39,990
June	29,960	* 9,630	15,140	44,250	16,790	14,420
July	6,000	2,650	3,390	9,130	4,990	2,020
August	1,680	1,520	1,550	5,460	3,000	1,310
September	2,090	2,300	1,720	3,600	2,550	1,500
Total	39,700	148,600	98,900	164,000	112,400	138,300

NOTE: From records of the Twin Falls, Salmon River Land & Water Company, based on rating curve of lower station up to June 6, 1910.

R. W. FARIS, being called and first duly sworn as a witness for defendants, testified as follows:

I have been a civil engineer for about 25 or 26 years, and have been connected with several irrigation projects, and built the main canal of the Salmon River Project. I am familiar with canal and reservoir losses, and have made personal experiments as to the loss from evaporation in shallow fresh water. The loss from evaporation in deep reservoirs is much less than in shallow small areas, and I am familiar with this reservoir and canal system, and from my study of this subject of losses from evaporation in general, and the comparison of this reservoir with other reservoirs, it is my view that the loss here will be about 4 feet per annum. I have made some experiments relative to reservoir losses due from seepage. I think the seepage losses on this reservoir would be greater than the evaporation losses, and that they would be approximately 7600 acre feet for the average amount of water impounded. In the absence of exact determination, it is the rule for engineers to assume that percolation losses will be ultimately equal to the evaporation loss.

On cross-examination Mr. Faris testified as follows:

My opinion that percolation losses are equal to evaporation losses is based upon Government records of reservoirs similarly situated as this one, so far as the nature of the surrounding rock is concerned.

Whereupon the following proceedings took place:

Mr. Longley: At this time, if the Court please, I move to strike all the testimony of the witness from the record, on the ground that it affirmatively appears that this testimony as to evaporation and seepage losses is not predicated upon any reading of similar conditions or facts, or circumstances, surrounding the conditions of this Salmon River reservoir.

The Court: I think I shall let the testimony stand as being competent. It might throw some light upon it more or less, as the facts develop.

On re-direct examination the witness testified as follows:

At the Sweetwater reservoir in California the evaporation was found to be $41\frac{1}{2}$ feet, and in that instance the percolation losses were found to be practically nil, owing to the return flow from the water apparently lost in storage having filled the interstices and ran back. In the case of the Clear Lake reservoir in Oregon the percolation losses were 60% of that due to the evaporation. In the Cold Springs reservoir in Oregon, at the end of the fourth year, the seepage losses were nearly double that due to evaporation, but that was accounted for by some direct leakage from the reservoir through the rocks adjacent. In the East Park reservoir in California the evaporation is found to be about 54 inches, and percolation losses are—the carbon is blotted, but I think it is 48. I have a clear copy of it that I can supply. The data as to losses in reservoirs in this country is very meager. I have the record of a great many reservoirs in India, and in other countries,

but as to physical conditions as compared with the Salmon I haven't the information.

On re-cross examination the witness testified as follows:

That the rule of ultimate percolation losses being equal to evaporation losses is empirical, based upon observation and experience, but one doesn't affect the other. The lava rock formation around this reservoir isn't conducive to excessive losses in that it isn't a stratified formation, and in that the fissures are not continuous. I would like to say that my assumption as to transportation losses took into account the elimination of the check basin.

G. M. HALL, heretofore duly sworn, and being recalled as a witness for defendants, testified as follows:

The total acreage of outstanding contracts January 1st was 73,348 acres. Of that total 65,727 acres was Carey Act land, and 4,939 acres were desert land, and 1,903 known as scripped lands, and 779 acres school lands. On January 1st, 44,022 acres of Carey Act land had been proved up, and 21,711 had not been proved up.

Whereupon the following proceedings were had:
By Mr. Hays:

Q. Of that 21,711 acres, how much was occupied or settled upon, and how much was not entitled to make final proof, that is what acreage had defaulted?

Mr. Longley: We object to that part of that question as calling for a conclusion of the witness and not a statement of any fact.

The Court: Sustained.

Mr. Hays: I will ask you, gentlemen, upon the other side: There is a large acreage, as you are well aware, upon which none of these Carey Act entrymen have made any annual proof since the time they made the entry, and no final proof. The acreage covered by those entries is, as you know, something like 16,000 acres.

Mr. Longley: If that is the purpose of the question, we have no objection.

Mr. Hays: That is the purpose. I desire to show by this witness that the acreage of the remaining valid outstanding Carey Act entry, as near as I can—

Mr. Longley: No objection.

Whereupon the witness further testified:

Of the 21,711 acres not proved up there were about 16,000 acres on which no cultivation had been made, and on which no one was living, and there were about 5,700 acres which were occupied and farmed, on which the people were living, but had not yet made their final proof, but could do so at any time. Eliminating the entries where there has been no cultivation and settlement, the net area of the project is about 57,348 acres.

E. B. DARLINGTON, heretofore duly sworn, being recalled as a witness for defendants, testified as follows:

The high-water period in the reservoir in 1911 was June 18th, in 1912 June 19th, in 1913 June 20th, in 1914 June 6th. The canals were designed and

constructed with an excess capacity of about 20% over the specifications. That is, the exact specification for carrying one one-hundredth of a second foot, or one second foot per hundred acres. They were built with a capacity of about a second foot for 80 acres. The system was originally built for 100,000 acres, the main canal for 125,000 acres, with 1,250 second feet capacity. One of the reasons for the comparatively small amount of water in the reservoir at the present time is lack of precipitation. The other is that the Vineyard Land and Stock Co. took more water than ever before.

Mr. Hays: Mr. Darlington, what were the facts with regard to the water delivery on the part of the Company and of the supply that you were delivering and had charge of?

The Court: Counsel is trying to account for the condition of the reservoir at present, and for that purpose the witness may answer this question, whether more water was delivered last year to the farmers than in previous years.

A. Yes, it was.

Whereupon the witness further testified:

It is my business to superintend the canal system and look after it, and I observed very carefully the method in use among the farmers with regard to use of water last year, and as compared with the use other years.

By Mr. Hays:

Q. And what was that method of use, compared with other years?

Mr. Golden: We object to that on the ground that it is incompetent and immaterial, your Honor.

The Court: He may state whatever the facts are. It is simply calling for comparison of the use as between the several years. It isn't calling for a conclusion of the witness as to whether an unnecessary amount was used last year.

Whereupon the witness further testified:

More was used last year than in previous years, and more was wasted last year than in previous years.

I roughly estimate at the present time that the area represented by what might be called the wetted perimeter of the canals is in the neighborhood of 400 acres.

Re-cross examination:

Mr. Longley:

Q. Now, I will propound this question to you, Mr. Darlington, or rather, the three questions I have here, and then give you this slip of paper, and ask you to make the computation called for by these questions. Assuming that there is 25,000 acre feet in the reservoir on March 28th, that the reservoir should flow the same quantity as in 1914, that the reservoir and canal losses would be the same as in 1914—

A. For that same period?

Q. Just a moment. That the full project, namely, 73,000 acres, should require water, that the delivery should commence May 1st, that one-hundredth

of a second foot per acre be delivered, how many days would elapse before the reservoir would be empty to the tunnel?

A. That is the original question, as I understand?

Q. You did understand it?

A. That is the original question that you first asked me.

Q. Yes.

The Court: Now, right there, you understand, Mr. Darlington, counsel wants you to calculate the acreage and also the loss, during that period, not during the whole season, but just during the period when water would be used.

Q. There ought to be another assumption also, your Honor, to determine what rate of flow. That isn't the practice of running water, to start with the maximum amount and run continuously.

The Court: He is asking you a certain question. This would seem to be definite enough.

A. I think that is definite enough.

Mr. Longley: Assuming the same facts, except that two and three-quarter acre feet of water be delivered at the rate of one-hundredth of a second foot per acre, how many acres could be supplied, assuming the same facts, except that the reservoir and canal losses be assumed at what you have testified they will ultimately be, and apply the question of the reservoir and canal losses to both of the questions I have previously asked you and inquired about, that

is, the length of time your reservoir will hold out and as to the number of acres which could be supplied?

Mr. Haga: I want an objection to all three of those questions, on the ground that they are purely moot questions, and they relate to matters that could not obtain in actual practice, and that the answer could be of no practical benefit to the determination of the matters involved in this case.

The Court: Overruled.

Mr. Longley: That is all.

(NOTE: To the foregoing questions, the witness answered by plaintiffs' Exhibit No. 23, heretofore set forth.)

On re-cross examination the witness testified as follows:

In 1914 there were 405 water users cultivating about 30,000 acres of land. Approximately 4,849 acre feet were delivered at the reservoir for domestic purposes during the year 1914, but that amount is not an average delivery; it is excessive.

Whereupon Mr. Hays, of counsel for defendant, offered in evidence a certified copy of the minutes of the Land Board, releasing 35,458.72 acres of the Salmon River segregation, order made on August 13, 1912, which was admitted and marked Defendants' Exhibit No. 17. An order of the Land Board of April 23, 1908, throwing open for entry 90,000 acres of land under the Salmon River project, to be opened June 1st, 1908, was then offered in evidence by Mr. Hays, of counsel for defendants, and marked Defendants' Exhibit No. 18, and admitted.

WILLIAM WAYMAN, being called and first duly sworn as a witness for the defendants, testified as follows:

I was born and raised on a farm in Iowa, and for a number of years since leaving Iowa have been in Utah, and for about 14 years was in Idaho, and am at present living in Montana. Since leaving Iowa I have been constantly engaged either in farming or handling farming operations, and was in the Indian Service in Utah for over ten years, in connection with the Uintah Indian Reservation project. I have carried on farming operations in various places in Idaho and have leveled and smoothed raw lands, and am familiar with the flooding and also the corrugation system of irrigation. In 1912 I was over the Salmon River project and made a personal inspection of all the farm units on the tract, with a very few exceptions, and am familiar with the Twin Falls South Side tract adjoining the Salmon River project. In the newer countries the lines of least resistance are followed by the farmers in irrigating, and often little attention is paid to the proper preparation of the land, but as the farmers have become in better position to cultivate their lands, and to farm with more stock, the lands are better leveled. It pays, however, to smooth up the lands from the first. The better preparation and more smoothing they receive, the easier and better and more evenly can water be distributed on them. For some soils the flooding method is popular, and for others a check system is used, but the best usage today on the greater majority of land

is what is known as the corrugation method, which consists of marks being run down grade, not always down the steepest grades of the land, and placed from two and half to five inches in depth and from two to three feet apart. The ordinary volcanic ash soil of Idaho requires corrugations about two feet apart, from that to twenty-six inches, to secure the best results, and in order to economize water on the majority of the volcanic ash soils, I would not put my corrugations longer than three hundred feet. If the corrugations are longer than that, water is wasted by percolating below the proper root zone of the plants. This waste water below the root zone fills up the lands and makes them valueless for agriculture if this water is not afterwards drained off. I am familiar with the growth of crops on the Salmon River project, and that part of the country.

Upon being asked how frequently it will be necessary to irrigate in that district, the following proceedings took place:

Mr. Golden: At this time, your Honor, we object to the question, and this line of examination, upon the ground that it is incompetent, irrelevant and immaterial, and in no way raised by the pleadings in this case, not an issue germane to the case, this testimony not germane to any issue. Furthermore, because the right, if any, of the parties, that is, the complainants and the defendants, are fixed by a written contract. Any testimony that would tend to explain or vary the terms of the contract would be wholly incompetent and inadmissible. I

understand, if your Honor please, that the theory upon which the case is tried, or can be tried, is that the rights of the respective parties to the action are fixed by a written, specific contract. No plea is made in the answer that there is any ambiguity existing in the contract, nor any efforts made to re-form the contract. This question is not injected in the proceedings, but on the contrary it is averred by the defendants, and all of them, that if any right exists in favor of the complainants for the delivery to them of any water, it is only by virtue of a proportionate interest in the contract, the issue being a square-cut one, solely fixed by a contract, and no ambiguity being pleaded, your Honor, or mistake of facts, or otherwise, mutual mistake between the parties, and we submit it is wholly incompetent and immaterial how these lands should be irrigated or farmed, or how much water should be used on them, unless it be that it will be the contention now of the defendant that there is an ambiguity, which the Court must construe or determine, in these written contracts. I may suggest, with your Honor's permission, that the precise question was raised upon the motion to dismiss, and your Honor there held that these contracts meant what they said, and you did so construe them at that time. So I say now at this time it is immaterial what method of farming was used or what method of farming is used by the settlers, their rights being fixed by a contract must necessarily be such, and are such, that they can't be varied by any testimony of this kind. And further, if the Court please, we wish to raise by this objection to the testi-

mony at this time the same question, if the Court will observe, as by our motion to strike certain portions of their answer.

The Court: This seems to be the same question that was presented at that time, I am very much in doubt as to what course to pursue. So far as the mere construction of this contract is concerned, this testimony is not material. The doubt arises because of the uncertainty as to the relief prayed for or the relief which can be granted, provided I shall ultimately take the view of the contract contended for by the plaintiffs. I thought possibly this testimony might be heard for the purpose of enabling the Court to grant some sort of practical relief.

Mr. Golden: This is perhaps an unusual case, that is, with reference to the relief, because like questions have not been raised, insofar as we are advised, upon any Carey Act contract. Our view of the situation is that whether the Court enters a decree of specific performance or quieting the title in the complainants to so much water, as per the contract specified, it is of no material consequence, and the sole relief that these complainants can ask for or can possibly expect from the Court was indicated by your Honor upon the motion to dismiss, and that is this, that, insofar as they were concerned, when the contracts were put in evidence, they had made a prima facie case as to their relief under the contract. Now, we ask for that relief.

The Court: What sort of relief could I grant in this case, provided I take the view for which you

contend, that is, suppose I take the view that the contract calls for water at the rate of half an inch per acre continuous flow for the specified season, what is going to be the decree?

Mr. Golden: That it be adjudged and decreed by this Court that these five or six complainants would be entitled under their contract to a permanent water right and to receive and have delivered to them, according to the terms and conditions of these contracts, the amount of water specified in the contract.

The Court: Suppose there is an insufficient supply of water for that purpose, for all the contract holders, I can't decree to these plaintiffs rights which would deprive all other parties of the same right, can I?

Mr. Golden: I think so, your Honor.

The Court: Suppose that half the contract holders were before the Court, and hold contracts which, with the construction that you ask we put upon it, would absorb all of the available water supply, could I require the defendant company to deliver to those plaintiffs all of the available water supply, to the exclusion of all other farmers who are not parties to the contract?

Mr. Golden: Your Honor could, and this is the situation, that either the contracts mean what they say or they mean nothing. Now, if, in the first instance, the Court determines that each person who comes here and asks for the relief sought by these

complainants, is entitled to the relief, for the purposes of this action, for the determination of the rights of the persons who seek relief, it is immaterial whether or not, by some misfortune or other, like relief cannot be granted, that is, directing the delivery of the water, the action being purely one to adjudicate one particular fact; was it required by these contracts on the part of the vendor to sell and deliver certain specific property, that is, this water? That adjudication being made, your Honor, that settles the issues there. Now then, the situation which arises is this, that because of the inability of the vendor, by reason of the insufficient supply of water, to perform all of these contracts, then it becomes, and it has been shown by other testimony, it becomes unable to respond to its obligations. Then the Court would be authorized, in view of the situation, to take charge of the project, appoint a receiver, if necessary, or receivers, and take possession, and collect the funds that may be paid by such parties as the record shows may be supplied with water, according to the contracts, and the moneys so coming from those sources may be applied toward refunding to the persons who are unable to get the water, indemnities, for what they have suffered by virtue of the failure of the company to carry out its contract. That is the view we take in this case, your Honor. That is the view that we have had on the motion, although the relief prayed for in the bill specifies that, and perhaps goes a little farther, but that is as far, I believe, as we could urge the Court, that we were en-

titled to relief in the action. Now then, let us go to the other proposition. If these contracts mean what they say, how does the fact that there is not sufficient water become material or germane to the issues, because the Court would necessarily, because of the injury to a great number in the first instance by the act of the defendant in selling something it did not have, refuse to carry out the plain provisions of the terms of the contract, on the theory that a wrong might be committed to them, but if the wrong was committed this company should respond and be made to respond to the persons who were wronged by the entering into of these contracts. So that the fact that there wasn't sufficient water, your Honor, to supply all the contract holders, could in no way affect the rights of these complainants. It is no fault of theirs, no fault of any of the contract holders. It is the fault of the company, the vendor in the contract, because they must have known, and the law will presume that they did know, what they were doing when they made these contracts. Now, this company, if it appeared to the Court that it cannot supply all of the contract holders with the water required to be furnished by the contracts, then I say it is the duty of this company to respond to the persons to whom water cannot be furnished, for their damages for this breach of contract which they have made. And that is the object of the prayer for relief, or the relief sought for in the appointment of a receiver, that the money collected for all water available to these contract holders might be held by this Court, so that the other contract

holders who have suffered wrong might not go hence without some compensation.

The Court: Your idea would be that the decree should construe the contract, and that then we should take hold of this whole property. How long are we going to manage it?

Mr. Golden: That would depend entirely, your Honor, on contingencies. That is, taking charge of the system, and collecting the amounts due under these contracts, and then have these parties who hold contracts come in and ask for like relief, or who are not in position to receive water from the system, because of the insufficiency of the supply, then your Honor, having the parties before you at the time, and having taken over the project, can decree and determine what damages, if any, they have suffered, for which they should be reimbursed, and when the reimbursement has been fully made then the receivership should end.

The Court: It may be well at this time, if there is some way of getting an interpretation of these contracts, to avoid going into the general question of the duty of water, and the best way of using it.

Mr. Longley: Of course, we want to suggest to the Court that if the defendants in this action are in a position now by offering the line of proof which will call upon the Court to make a new contract for the parties here, that is, call upon the Court, in the absence of any ambiguity in the contract, to say to us, notwithstanding the fact that you have made this

contract for the delivery of so much water, I will now take and receive evidence as to what the duty of water should be, and then fix the contract accordingly; that could be the only theory, as we view it, upon which the Court would be justified in receiving this evidence. Then we will want and feel privileged to have our request granted, that the price be likewise readjusted and adjudicated, and if we are only to receive what these gentlemen say we should have, we will want the Court to also tell us what we should pay for that which we are to receive, under this testimony.

The Court: I had in mind that that was possibly a contingency that you had anticipated. In other words, if it should turn out that the company agreed to deliver a certain amount of water, and now has capacity we will say to deliver only half that much, whether or not the relief to be granted would be along the line of scaling down the contract price to correspond with the amount of water which could be delivered. I do not look at all favorably upon the suggestion which has been made by counsel that the Court enter a decree here and then take charge of this property through a receiver to collect the moneys. It would strike me that that would be an extraordinary thing to do. As I understand these contracts, if the installments be paid when they are due under the contract, it will take years before the full amount could be collected in. The receiver, of course, would have no greater rights as against the contract holders than

the company has. In other words, he couldn't compel the farmers to anticipate a deferred payment. These run over a period of ten years, do they not, these payments?

Mr. Longley: If an interlocutory decree were entered first, fixing the rights of the complainants, we believe the result would be the same ultimately as the decree suggested by Mr. Golden, except as to the receivership.

The Court: I don't think, Mr. Hays, I quite appreciate the materiality of this testimony. You are now seeking to show what amount of water is reasonably necessary for the irrigation of land. Or, in other words, to show the duty of water.

Mr. Hays: In a way, yes.

Court: It has been conceded once or twice during the trial. I understood counsel to say yesterday once or twice that they didn't raise any question as to your right to install the rotation method of distributing water. Perhaps you didn't understand them, or they didn't make themselves clear, but you understand now.

Mr. Longley: That is correct, your Honor. That is fixed by the contract.

Mr. Hays: I do. At least I hope so. And I think I understand the Court. And now I hope I will be able to make the Court understand me. We will admit, for the present then, all hands, that the rotation system is the desirable system to use. Very well. It was made our duty to provide for that; it was pro-

vided for in this contract. Now, as quick as you establish a rotation system, what does that mean? Somebody must provide for the amount of water you put in the canals, and when it shall be put there, and the proposition here is when shall that water be put there. That is all there is to it. Our canals are built of a sufficient size to deliver the head they want.

The Court: They don't question that.

Mr. Hays: No, that is not questioned. Now, when shall we deliver that? What is the rotation system? What does it mean? How often shall we deliver that? As I now understand the controversy, what we were proposing to show by these witnesses was that the rotation system was desirable and necessary and the best plan, and that is admitted, and we have introduced testimony to show that the canals were of the proper size, and that is admitted. And now there remains the question as to when it shall be delivered. The rotation system means that it shall be delivered alternately, not continuously, and I propose to show there how that should be done. Now, as I view it, that should be done often enough to successfully and properly irrigate the crops. We should deliver that head of water, this one-hundredth or more, if we can, often enough to irrigate the crops. That is all there is to the rotation system, is to deliver it often enough to accommodate the crops and accomplish the result. That is what we propose to show. We have introduced testimony here to show that we have a certain amount of available water supply. Let us say for argument at the present time we have 100,000 acre

feet of water that we can deliver. We are to deliver that under a rotation system, as we all agree. Now, how shall we deliver it, how frequently, what shall the intervals be? And in that connection we will go further; we will show, for instance, what the normal acreage is in the different kind of crops on these irrigation projects. To illustrate, an irrigation project may be roughly divided into two parts, the part on which they raise alfalfa and other grasses, and the part on which they raise grain and other similar things, requiring a similar amount of irrigation. Now, half is of one kind and half is of another. That is about the way the ordinary farm runs, or that is about the way the ordinary project runs, and there has been quite a good deal of data in this State, and that is available, as to about how that is divided, and that shows it is divided about equally, perhaps a little less in alfalfa and grass. Then comes the question, when shall I begin to turn on the water? Well, that is, when the season in an ordinary year opens, when shall I begin? Now, what crops first require it? Now, let us say that the alfalfa first requires it. Then what crop next requires it, and about what time, on this project, and how many times am I going to turn it on to the alfalfa field, and how many times on to the wheat field. That is the thing that determines the method of rotation, at the time. That also will determine in the end whether we shall get a good crop, when our water supply will be exhausted, and how many acres can be successfully covered, because those are only dependent on each

other, and only in that sense is there any duty of water involved here. It is frequently said that grain requires two irrigations. For instance, with fall plowing you have to irrigate twice on your grain. Then you irrigate alfalfa how many times? Well, I will irrigate my alfalfa three or four times. Now, on the South Side Twin Falls tract a great many people irrigate three times, and some irrigate four, and there are other variations. Is this a proper practice and a good practice, and how shall this ditch be conducted so that this water supply shall be delivered to these people? That was one of the propositions of the so-called cross-bill here, to bring it before the Court, so that the Court might see just how we proposed to handle this water supply, and just how it might be handled so that these people could get a satisfactory water supply, and at the same time so that the interests of the people who had invested in this project might be conserved. We don't desire, upon our part, to impose a burden upon them that they can't meet. We don't desire to impose a burden in the way of irrigation that isn't practicable and can't be worked out, because we must get our money out of this project. No matter what we think about this, we have got to get our money out of this project, and we have got to get it out of the people that live on this project, and they got to have a method of irrigation that is reasonably successful if they are to get any reasonable returns from the farms, in order to pay it. Now, we want to show to this Court first how that can be done, just how these rotations should be man-

aged, and just how they result in the way of water delivery. For instance, we propose to prove by this witness that in the ordinary years the grain will be irrigated about a certain time, first, that it will be irrigated twice, or, in some season, perhaps three times; that it will be irrigated about a certain time the first time, and the second time the irrigation will come in at about another time. Then what kind of a head should a man have at that time? How much water should be turned through for that purpose, for the purpose of the use on grain, and what is a practical irrigation head. For instance, I might say, here, we will expect that you are able to irrigate four acres of land a day, with a head of a second foot of water, by irrigating for twenty-four hours. I might use that as an illustrative unit. Then, if he had that water for ten days, he could irrigate a forty-acre tract. If he had it for twenty-days, he could irrigate an eighty-acre tract. And we must show how we are going to do it and how this water supply is to be furnished to these people, how these rotations must be worked out, just how the thing must be practically done, and we are not going to ask this Court to do anything that isn't practical. We don't propose to do that. But we wish to show to this Court just how this thing can be done. We have our ideas about how far the water will go, and just exactly how it can be done, and without any hardship being worked upon any man who lives upon that tract. It is to illustrate to this Court just how it can be done that we are proposing to offer the evidence we have now. And

I might say, to illustrate, and this Court may see another feature of it—when the next Carey Act project was made, on the Oakley project, a certain duty of water was established there by contract, a duty of water delivered at the farm, of one and a half acre feet.

Mr. Longley: Assuming that the settlers there should contend that that amount of water is insufficient, and should invoke the aid of this Court, would it be your notion that the question of the duty of water could be raised under that contract, and evidence introduced which would give those settlers more water?

Mr. Hays: Which contract?

Mr. Longley: The Oakley contract.

Mr. Hays: You are counsel, I know, for the Oakley settlers, and already have some litigation on that subject, so you will pardon me for not answering that particular thing at this time, Mr. Longley. But I simply call the Court's attention to the fact that that duty of water was established there, established by contract. I am not going to ask this Court to establish any duty of water on the Salmon property or any system of rotation that isn't right or that doesn't work out, but we do propose to ask this Court to give us an opportunity to establish a rotation system whereby that water can be used successfully upon such area as it is used. That is the purpose and object, just simply to show what rotation should take place.

Mr. Haga: If the Court please—

The Court: I will hear you after lunch, Mr. Haga. I was going to say, General Hays, that seems to be the real difficulty. The plaintiffs come here contending that they want a certain amount of water. They admit that you may deliver that water to them in bunches, so to speak, or you may deliver it continuously; in other words, you may bunch it together and deliver it for certain periods of the irrigation season, or you may deliver it continuously as may be best. Now, your contention assumes that you made no such contracts. You assume that you made no contract to deliver any specific amount of water.

Mr. Hays: Yes, a certain head, but not a certain number of acres.

The Court: But no specific amount of water?

Mr. Hays: No, a certain head.

The Court: So, after all, it comes to be a question of the meaning of the contract, and if plaintiffs are right in their construction of the contract that you deliver a certain amount, then this testimony as to the duty of water and method of delivery is immaterial. I understand this to be the view of the plaintiffs as to the meaning of the contract. It gives them water equivalent to a continuous flow of one-half inch per acre, and further provides that rules and regulations may be made for the best application or use of this water, and that ultimately, when the canal falls into the hands and under the management of the farmers themselves, they might very well conclude that the rotation method would be best, and then adopt that method and enforce it upon all water

users, but that the minority would not have a right to make the claim of rotation as against the will of the majority. It is the plaintiffs' idea that as a technical legal right they can demand that water be put in the canal on the first day of May, as provided in the contract. But if water is not put in, and it is not needed, they would have no remedy. Strictly speaking, as a matter of legal right, they contend that the terms of the contract must be complied with, and that water must be turned in on the first day of May.

Mr. Golden: We contend that we are entitled to water at the rate of one-half inch flow of water per acre, continuous flow, from the first of April to the first of November, or, if delivered by periods, as the crops need it, its equivalent during the irrigation season. We do not contend that we are entitled to possession or use of water when we don't need it.

Mr. Hays: If that is admitted, then the whole question of the duty of water is open, must be.

The Court: It may be that the duty of water is greater this year than it will be next year, or vice versa. But can the Court relieve you of the obligations of the contract, provided they are obligations, merely because the Court may conclude they do not need all of the water which they bought?

Mr. Hays: I called the Court's attention to a great number of decisions of the Supreme Court of Idaho establishing the policy of the law, that no man can have water when he doesn't need it.

The Court: That question doesn't arise. It is a question of the construction of the contract, and I am assuming all the time that the plaintiffs' construction is correct.

Mr. Haga: In order to come to any determination of any practical value to any party to this litigation, it is necessary to go into the question of the duty of water. Although the contract refers to some specific amount, nevertheless the fact remains that under the laws of this State, both the statutes and the constitution, the parties can not agree to any specific amount of water which amount is more than required for use. The public or the State, or the people of the State, are a party to each water right suit, because under the constitution of this State the water is the property of the public, and the right to "the use of all water now appropriated, or that may hereafter be appropriated for private use * * * is hereby declared to be a public use and subject to the regulation and control of the State in the manner described by law." The most that these water users can do is to agree with the company that it will construct certain works and undertake to deliver under certain heads the water to these individuals as they may need it. They have no right to parcel out among themselves the public water of the State, except such as can be applied to a beneficial use.

Mr. Hays: May the Court please, the Court suggested a line of questioning that might be followed. At that time the Court indicated it. I did not grasp it fully. I was thinking of it at noon, and I am not

just certain what that line was now. But, as Mr. Haga has indicated, we have been anxious to arrive at some solution of our problem, and for that reason we haven't raised objections to this form of complaint. I have talked it over with counsel to some extent. Mr. Longley didn't bring this suit originally. It wasn't brought upon any particular theory he had. It was brought before he was counsel in the case. And that we might arrive at some solution of this problem, we put in that cross-bill, because we thought possibly that would raise the issue in such a way that it might aid the Court to aid us in the determination of the difficulties which we have encountered. The project originally was 73,000 acres. By various circumstances it has been cut down to 57,500 acres, in effect. These people who have entered this land and haven't proven up, they have not settled there, they have not made their annual proof, and they haven't come back at all. Under the statute the State Land Board cannot grant them an extension. That has been decided in the Loveland case. They did grant them, it is true, an extension of a year at one time. That time is up now. And we have thought, and have suggested to counsel on the other side, that the only way for us to get together is to both go before the Land Board and agree that these be, for the present at least, cancelled. If the water supply should ultimately turn out as good as we think it is, then nobody will be hurt. Cut it down fifty thousand acres, and then, in addition to that, there is only in cultivation thirty thousand acres. The ordinary growth of these projects is somewhat slow.

I will use an illustration perhaps outside of the record. The South Side Twin Falls project, many years in cultivation, 200,000 acres sold, and only 160,000 acres cultivated. So that in the course of time this thing would go on, and we could arrive at the point, and we will do our best for the present to hold things as they are and then arrive at some conclusion. Now, I have one or two things to suggest to the Court, to see if I can be of some help or aid in arriving at a proper conclusion. The theory upon which the complaint on the other side is brought is that the first men there, the early settlers, obtained a right, and that some other people later on may be eliminated. In other words, there is in their complaint the idea of priority; that is, the first come, the first served; that these people are prior. Now, when I spoke of a proportionate right, to which my friends have alluded a time or two, it wasn't altogether by any means with regard to the water right, because that question of proportionate right has an important bearing upon the relations of these parties to each other, and particularly upon the relation of these parties in view of the kind of complaint. Let us see what the result is if we seek to cut down this project in the way that they suggest. Section 1615 of the Revised Codes provides that the proposal shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual right to embrace a propor-

tionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. The settlers' contract itself said that this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights, and all other rights and franchises of the company. Then on page six it was said as follows: 'Priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein.' Then again it is mentioned a little later on in the contract, on page seven: "Each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein based upon the number of shares finally sold in said canal." Then again the same thing is mentioned in paragraph ten of the contract, which says: "And a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein." The words "rights and franchises" was held in the West case to mean water right. The contract in that case was not quite so specific as it is here, which specifically mentions water right. This contract provides that there shall be no priority. If they have acquired a proportionate interest in these works, then there can be no cutting off of the subsequent entrymen of the men who came last, and there couldn't any such result come about. If there was

to be a reduction under this contract, that reduction must necessarily come about by a pro rata cut-off of acreage, that is, each man under this tract would have so much cut-off; it seems to me that that would be the inevitable result, that there can be no other manner of scaling down the acreage, that it would necessarily that on account of these provisions of the statute and the contract. So that if anything like that is to be done, then that would be the way it would have to be done.

Now, there is another problem here, and that is connected with the patent. We perhaps can acquire no lien upon property to which we have not both a sufficient supply of water to reclaim it from its desert character—if we haven't enough water to reclaim this land, then we can't get a patent for it, and these settlers will fail. The settlers can't get title to the land except they get patent from the Government, and except they have sufficient water to reclaim it from its arid character; that is, they can't get title to the land on the basis that there is water enough to reclaim it and not pay for it. On the other hand, this matter of a patent also bears upon the question of the proportionate right. If these people are to have this cut down, then it must be cut down proportionately, and they will only get patent for part of their land; they can't get patent for all of it; they will just get patent for a part of it, and a proportionate part will be cut off. We will have our lien for the full contract price upon the remaining land. We wouldn't have a lien upon all the acreage, but we

would have a lien upon the remaining land for the full contract price. But on the other hand, the settler can't get that other land, because we haven't furnished him the water. If we do furnish water for it, then we must be paid for it. So that there is that question in any cutting down of acreage, how is it to be done, and how does it affect this matter of patent. There are many important questions outside of this matter simply of the distribution of the water supply. That question of proportionate rights stands in that way. Perhaps I may illustrate the situation to some extent; here is another problem. Let us admit for the present that there isn't to be water for more than half that land this year, that is, half of the existing acreage that was in cultivation last year; then how is the water going to be distributed? We are there; we haven't got patent to it. The works haven't been turned over to the operating company. We wish to do that, and the operating company sort of took charge, but it hasn't been legally turned over; what is going to be done, then? Well, those people then will want to distribute that water, the ones who were there first will want it all, of course; they will want it on the basis of a continuous flow, and the man who settled there a little later will think that a proportionate interest this year will be a great thing for him; a proportionate interest, he will think, this year is a safeguard; whereas their theory wouldn't keep anybody's crops alive. He will think it is all right this year. As between themselves it will be fine, but as against the company it will be a different thing.

Mr. Longley: You have reached the point in your argument where you assume that you have but half enough water. Assume for the moment that you have no water at all, then how would the testimony which you propose to introduce here, as to beneficial use of water, enter into the question of your rights under this contract?

Mr. Hays: I will get to that point a little bit later. This year when the water supply is short the settlers will be perfectly willing to have the system of rotation used. It is difficult on the part of the company to deal with these problems, because there are so many settlers, each having his own views. Sometimes they follow the advice of counsel, sometimes they do not. The segregation was cut down 37,000 acres before the land was opened for settlement. Then about 10,000 acres more were cut off and now there are only 57,000 acres on this project left with valid contracts. If these people can be served with a water supply adequate for their purpose, these 57,000 acres, then we certainly have a right to divert this water for that purpose, and either that acreage or such other acreage as it can be made to serve, we have our reasons for believing that it will serve a certain acreage, and that is what we wish to show, in order to aid the Court in finding some way out of this difficulty. The Court called attention to the fact that wherever people had contracts for one-hundredth of a second foot, and so forth, that water was always delivered to them. In the last few years a great change has come about, the water users under

a canal system taking a proportionate interest, that is, each one has the same right. Then the influence of the Reclamation Service has been very great upon that form of contract. The Reclamation Service provided that these works and their feasibility and the water supply, and everything, were to be determined by the Secretary of the Interior. Now, when you come to find out what water you are going to get upon a reclamation project, you have to look to their book of questions and answers relating to the operation—

Question: How much water will be furnished for the land? Answer: Such amount as may be available from the works controlled by the United States, and not to exceed the amount necessary for the proper irrigation of the land. Question: What assurance has he of a sufficient supply? Answer: The Water Users' Association is required to limit the land represented by those shares to the highest efficiency of the water.

We have been trying to operate this way under the Carey Act with more or less success. The Reclamation Act illustrates that the idea had already begun to prevail in the public mind whether the water right was sufficient for the entire project. They no longer bothered about having an inch to the acre, or anything like that. The only question was as to whether the water right was sufficient for the entire project, and also, what was to be the manner of distribution. Sec. 6 of that Act provides that beneficial use should be the measure of the right. When the

Reclamation Service comes to make these contracts, they don't make contracts for any specific amount. The Reclamation Act did not provide for the manner of distribution, leaving that to the states. It only provided for taking a water right in bulk for the whole project. The State statute does not provide that the settlers shall have so many inches of water, or require a contract to contain a provision to that effect. In the original form of the Carey Act contract, which the Court will find in the irrigation laws of 1899, as prepared by the State Engineer, it had all the provisions found in this one, but it had an additional provision, and that was that a person should get so many acre feet, but no such contract was ever agitated. There was substantial change made in the form of the contract and of the subsequent contracts that were made. The original form of the contract would have made all tenants in common. It provided for a deed to the system, a proportionate interest to the water, and a proportionate interest in the system, to be given under the old form of Government or community ditches. Bearing in mind some of the difficulties that had arisen under this form of contract when the first Twin Falls contract was made, it was provided that an operating company should be organized. The reason for that was that this other method of giving deeds wasn't satisfactory. It left the people in an unorganized condition. They couldn't do business. In the first form of contract that was made, and all subsequent ones that expression with regard to giving the con-

tract holders a certain number of acre feet was omitted, and the people at that time had an idea that they had taken up the water right for the entire project, and if they came to express a certain number of acre feet, that that might be a bad provision in the contract, and that that might interfere with the distribution. It had been found by experience in the Boise Valley that the amount of water required on any given piece of land was a variable quantity. Beneficial use is the measure of a right, so in other projects the question determined first was whether there was enough water for the entire project, and second, if there was, then to determine the method of distribution. So when it came to carry out the idea of distribution on the Twin Falls contract, reference to a specific amount of water was omitted, a provision simply being made for giving the contract holders a certain interest or proportionate interest in the company that was to operate the system. The form of contract that is made with the settler is presented to the Land Board and approved by them, so that the making of the settlers' contract was subsequent to the State contract. It was intended to be in conformity thereto. The only contract the settler actually received was this document, settlers' contract, Exhibit "C," which provides that the settler should receive one-hundredths of a cubic foot of water per acre per second of time, in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company, and further, that he should be entitled to

a proportionate interest in the canal, dam, water rights, and all other rights and franchises of the Land & Water Company. Contract further provided that the Land & Water Company should retain control of the Salmon River Canal Company, and that the water should be measured to the users from the place of diversion in the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine, but in accordance with such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from the canal system. The settlers' contract provides that he was to receive water in accordance with the terms of the contract and the contract said he was to receive it in the manner as stated.

Mr. Longley: That provision says that so long as the Land & Water Company shall remain in control. How is the settler entitled to receive it after it gets out of its control?

Mr. Hays: The contract provided that the Land & Water Company should prepare and put in condition a physical system of distribution, and that the settlers should fall heir to it. In the earlier contracts there had been a provision that has made it obligatory upon the company to install a system of rotation as provided in the contracts. For instance, the South Side contract had such a provision, and the company found that they had better not do it. That it was easier to do something else, and less ex-

pensive, and occasioned no litigation. Don't try to install any system; that was so much easier, that no company wanted to undertake that afterwards, and so this change was put there: "It is agreed that said system of distribution by rotation shall be devised by the party of the second part, and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited." In other words, the Company didn't want to have it obligatory upon them, because somebody might afterwards find a cause of action against them because they hadn't done that, so in this form of contract that earlier form was modified.

Now, as to the one-hundredth, they believed it was necessary to prescribe the amount of water that a man might receive at one time, and this is governed in this contract. The capacity of the canal fixes the head that a man can receive. In this case it was found desirable to build extra capacity so as to better the service. In the very first argument when we took up this case I said that if there is a criticism about this contract, it is about that one-hundredth, because that should be, in my judgment, a more ample provision, and it was built with a more ample provision. Ditches couldn't be built on the basis of allowing a man to wait until long after the time when he should begin using the water, coming in and demanding all of his water at one time. As we view this contract the settler is entitled to his one-hundredth or more delivered to him in accordance with

the terms of the contract, which terms provide that the water shall be received and measured to the users at the place of diversion at the main laterals, and in such quantities and at such times as the crop, etc., may determine. There is another point: The contract provides: "From the point of diversion in the main lateral." It doesn't say at the half-mile point, or any other point. We were bound to build our works to the half-mile point, but the water was to be measured from the point of diversion from the main lateral. When this contract was made it was the idea under other projects that the lateral should go into the hands of the people under it, and that they would run it themselves. Rotation grows up on laterals because you can't put into the very end of the lateral the water that the user is there entitled to, without perhaps undue waste, so that all of the people who have any rotation are the people who rotate beyond these laterals. No matter what may be the ultimate view of the Court as to the construction of the contract, we would of necessity have to have this testimony so as to make a record, and so perhaps as to get the whole situation before the Court, in order that the matter might be determined in some way, or that the Court might see whether it might be determined in some way. There is an Idaho case upon the question of the right of one man to more water than he needs, which is somewhat instructive: "The theory of the law is that the public waters of this State shall be subject to the highest and greatest duty. The fact that a water user and consumer has

a rental right for a fixed number of inches of water does not of itself entitle him to that number of inches of water, unless he can and will apply it to a beneficial use." When he ceases to apply it, it is then available for another user and consumer. Practically that is the rotation system in practice, and even where a user has a right and has bought that many inches, he doesn't get it unless he needs it. He can't make a contract for a larger amount than is necessary. It was agreed and stipulated by the contract that we shouldn't oversell our water supply, and it wasn't the purpose of the company to so oversell, and they thought all these things had been determined beforehand adequately, and in ordinary cases where those things are determined by the representative of the State, it is final. But whatever the law is, that isn't practical for us, because we must get our money from these people and must have a lien upon the lands to which we furnish water, and we must get a patent to this land. They can't get title any better than we can get patent. We are all somewhat in the same situation, and, therefore, we must work out some method whereby every man who is there shall get title to his land for the full acreage, and if there is water enough to irrigate the remaining 57,000 acres, let us introduce our evidence, or let us wait and demonstrate it from a practical standpoint and see what we can do. If it is shown there isn't that many acres, then they will have to devise some plan—and they can't devise it without the aid of the settlers, very well—whereby they can get rid of the surplus

acreage. I can't see any plan that could be worked out under any other method that would get the settlers anywhere, or get us anywhere, and preserve the project in a reasonable way. Perhaps the other side will say: "We will keep our land, but you haven't given us as much water as you are going to, and therefore we will cut your price down." There is one difficulty about that. They can't keep their land and do that. They can only get a patent for what land they can water, and therefore, they can't get any title to it, and we can't get any lien upon it, and if there is any cut in that way it has to come in proportionate amounts off of each man's land. A cut in price would amount to practically the same thing as a cut in acreage, from the point of view of dollars and cents, but there is this difficulty about it, that it presents an impossibility in the way of carrying it out under the Carey Act, as we view it.

Let us put the question in this way. We are trying to show what amount of water is needed, and they are claiming the amount that is fixed by contract, so they come to us and say: "The contract is good enough for us, we are entitled to the amount fixed therein, although it is too much, and you can't take it away from us." And further, they say: "It isn't enough to go around on that basis, and therefore the Land & Water Company are not to have a lien upon as much land." Then we would come back and say: "That would be all right if you were hurt, but you are not hurt, you can't complain, if there is water

enough to irrigate your lands under reasonable terms and conditions." They can't come into court seeking relief where they are not injured any way, because they wouldn't be harmed if they got water enough.

Mr. Longley: The third paragraph of the settlers' contract states that: "The consideration for the water rights hereby agreed to be conveyed is the sum of Sixteen Hundred Dollars." Now assuming that you have sold the water contracts in excess of the water supply, and an action were predicated upon those facts, would the Land & Water Company be required to afford any relief as to the reduction of price or as to the cancellation of the excess water right, or must the matter stand as you have bought it?

Mr. Hays: Our answer to that would be if you have really got water enough to irrigate your land, are you hurt? And should we cut down the acreage, as you seek to do here, if you are going to get water enough? We were directing our testimony along this line. Your certificate said that you would have one-hundredth of an inch, in the manner and form and way provided in the contract. We now propose to show what is reasonable under this, and how it should be done. This, in itself, doesn't prescribe the rules and regulations as to how it should be done. That is a matter that may vary from year to year. For instance, in years of great drought, as this year, it would require a different method of distribution to that used in years of a plentiful water supply. We are not attempting to present any testimony with the

view of giving to the Salmon River settlers any water supply that is insufficient, but it is our idea to show just what is needed and how the distribution should be held and what result will follow from it.

Mr. Longley: May it please the Court, candidly I confess my inability to attempt to reply to the argument of counsel, but I do wish to make a statement at least of what relief we desire, attempting to answer in part the suggestion of the Court this morning. We seem to be confronted by this situation: Obviously there has been a sale of water rights in excess of the available supply. Now, to justify it, or rather, the defendant, Land & Water Company, to justify their position under this contract, say that we are not entitled as a matter of right to the water sold, but we shall have a proportionate interest in whatever supply may be available. We in turn then say: "We will not pay if we are not entitled to receive what we bought, and not paying, not attempting to secure patent, not attempting to prove a lien upon these lands of the water right as provided by the State statute, we are of the opinion that the Land & Water Company, or its assignees, will be unable to secure a foreclosure, and there the matter stands. Because of that fact we are in this position, and we want relief some along this line: We want this Court to tell us, if it will, what our rights are, precisely what our rights are under this contract, insofar as the correct interpretation of the contract is concerned. In other words, we want the Court to say to us: "You bought a water right of a certain amount," if the contract is susceptible of that interpretation.

Then also say to us, "And for that water right you must pay, either to an officer of this Court or to some one who will hold the matter in statu quo until the fact can be determined as to just what you will receive, that is, that you will receive the thing you are expecting to receive, upon payment of the amount due." We want to make these payments; we want to get our patent; we want to go ahead and develop our tract. The settlers are the last men to hold back and prevent the development. And the development has been prevented by the continued refusal of the company to recognize the one thing which we say they bought, and which they say we are expected to pay for, and that is a water right. And so I suggest to this Court that, following the wording of this contract, that if we are entitled to a water right of four and sixteen-hundredths acre feet, and this Court tells the complainant in his action that they are entitled to such a right, for which they must pay the amount stipulated in the contract, the beginning of the solution at least is here. Now, I will make a further suggestion. It is rather in the nature of a prophesy, perhaps, but the moment the amount of water is determined by the Court to which we may be entitled, and the moment the Court tells us that those who receive that water shall pay for it, the situation will adjust itself, in my opinion.

Mr. Hays: Mr. Longley, upon what basis do you want that supply determined—upon the basis of what you find the run-off will be this year, or—

Mr. Longley: No, indeed.

Mr. Golden: Upon the basis of your sale of it, General.

Mr. Longley: I want the availability of the water supply and the water supply determined, as you can determine anything, it can only be approximated at best. We are claiming that the measurements for the various years should be averaged and determined in that way, and then we be given precisely what we bought under the terms of this contract. While there is a variation, yet the Court can determine the general average, and then if the settlers are inclined to save, they can certainly guard against a short year of this kind. In other words, they are entitled to the benefit of that very situation, rather than the construction company, because of the contract, and we are here under the terms of this contract. It occurs to me that it would be a novel proposition for the settler, there would be a great many things that he couldn't possibly understand in this contract, and we are not going outside of the record when we say that this contract was not prepared by him or with his understanding, but was prepared by someone, and entered into by the State, and the settlers' contract was submitted to the State's authorities, and was there passed upon. And right in that connection, if the State had at that time any complaint to make on the amount of water sold to us under this contract, it was the time to speak then, and not now. In other words, the law requires the investigation by the State Engineer as to the proposed plans, and each step involved, the necessities of the soil, the amount of

water, and we must assume that it was passed upon by the State Engineer, and the State Land Board is given the right to pass upon these questions. Now, there are a great many things in this contract which the settler couldn't possibly understand, but here is one sentence that he could understand and must appreciate: "The consideration for the water right hereby agreed to be conveyed is the sum of Sixteen Hundred Dollars." Now, he agrees to pay that, and having understood that much of the contract, then to be brought into Court for an interpretation of this Court, and then see experts go upon the stand to determine the duty of water, the beneficial use of water, subsequent to the time of his entering into the contract, and materially changing the obligation of the contract and the contract itself, I say that in a situation of this kind, if we are expected to pay, we ought to be entitled to receive what we pay for. If there was a mistake in entering into the contract in the first instance, that mistake can not be brought home to the settler, who will suffer, under the theory advanced by the counsel, that he must take a proportionate interest in what may be there available, because that may mean something or not. It is just the substance and the shadow. He pays for the shadow, having contracted for the substance. Because these men come in and testify under this question that he doesn't need the substance, but something well along toward the shadow. The construction of the contract, while the relief is not clear to my mind, and never has been, there certainly has

been a breach of this contract, for which we are entitled to some relief, and it seems to me that an interlocutory order or decree along the lines suggested, that the amount of water be determined, the available amount, that the rights of the settlers under this contract be determined in acre feet or second feet, or in some way, or at least the contract interpreted, and then we be required to pay our money and proceed with the development of this tract.

Mr. Hays: Mr. Longley, do you people have any objection to the State Land Board following the law and proceeding in accordance with their rules and regulations, which they have, to cancel that sixteen thousand acres on which nobody has settled?

Mr. Longley: I don't know why you should ask us if we have any objection to the State Land Board following the law. It is their duty.

Mr. Hays: We haven't been able to do it, as we understand, on account of your objection.

Mr. Longley: We object to the turning over of this system as complete with no water in the system for operation. That is the objection made, and the only objection.

Mr. Hays: You have no objection then to the other?

Mr. Longley: Not in the least. They can follow the law so far as the settlers are concerned, I am sure.

Mr. Hays: There are some thirty thousand acres in cultivation, and some fifty thousand acres for

which water right contracts now exist, so that that would represent the difference now between us. Those owners of 37,000 acres of water contracts, that is, people who have cultivated that 37,000 acres of land, own 45,000 acres. The remaining 10,000 acres is Carey Act land, proved up on, for which they have patent, but which they haven't cultivated. Does that situation offer any practical way of arriving at a conclusion?

Mr. Longley: It always has to me, but I don't see that it is a proper matter for consideration by this Court, unless there is a formal request for it.

The Court: It is certainly an extraordinary case where both sides want relief and neither knows what it wants. I assume that counsel for the defendant are prepared to go into this matter of the duty of water, but would like to ask whether both sides are so prepared. I am disinclined to take the view that it is a material issue at the present time, so far as the primary question is concerned, but if witnesses have been subpoenaed here at a considerable expense, I was going to suggest that perhaps the testimony might be taken somewhat in the nature of depositions. We could probably get through with it in a day or two, and then if it should ultimately become material in any view of the case, the record would be ready for use. My present impression is that primarily this is a question of the construction of this contract, and that this testimony would not assist us in construing it. Do you have any objection to proceeding in that way, Mr. Longley, that is, to having

this testimony taken, to be regarded as provisional evidence?

Mr. Longley: I will say, your Honor, that our witnesses, with the exception of perhaps two, have all returned to their homes, and it occurs to me now that we would be obliged, if we go into this matter on the suggestion of the Court, to recall not only the witnesses here at the opening of the trial, but such additional witnesses as we could afford to bring here, or whose testimony should be taken in Twin Falls, to pass upon the value, testify rather, as to the value of a water right, assuming that it should be reduced to a point as indicated by the experts. And so, for our purpose, while I should like to have the full and complete record made, for our purpose it is quite necessary that the Court should rule upon the question, if possible, and require us to do one thing or the other.

The Court: I am rather inclined to permit the testimony to be taken and it will be deemed simply as depositions, however, not to be considered part of the record at present. If the question becomes material, you can introduce the testimony taken, and also take further testimony. It is an unusual case and I am very much in doubt whether I can enter a decree by simply construing the contract. That seems to be about all that counsel for plaintiffs have in mind. Can a suit be maintained merely for the purpose of construing a contract, without granting any relief?

Mr. Golden: Adjudicating the right.

The Court: But adjudicating the right means granting relief. If I construe the contract, that would be the theory upon which the decree would be entered, but what would it require the defendant to do, or to refrain from doing?

Mr. Golden: It would quiet title in the plaintiffs, to the amount of the water right.

The Court: I cannot quiet title to a water right in which a large number of persons are interested without having them before the Court.

Mr. Golden: As between the complainant, the vendor and the vendee, the adjudication would hold, without the appearance of any other party to it, because while indirectly it may affect the other parties, yet as between the contracting parties it would settle their differences and rights, if any.

The Court: What would be the purpose of all this evidence about the amount of water supply then, if it was merely to construe the contract?

Mr. Golden: For the sole purpose of showing to the Court that this company is unable to carry out all of its contracts, and for that reason, and because of its insolvency, that the Court take charge of this contract. That was the purpose, your Honor, and when we eliminate that, if the Court is disinclined to take charge—that was the sole purpose, and no other, because that is one of the principal reliefs asked for after the adjudication of these rights.

The Court: You don't allege that they are mis-

managing the property? The property is being well managed at this time?

Mr. Golden: It has sold and disposed of water.

The Court: Yes, but it is not doing so now. If you had asked that it be enjoined from entering into further contracts, that would be clear and definite.

Mr. Golden: We have asked for that relief, your Honor.

The Court: The defendants seem to be very willing not to sell any more. If that were all we could enter a decree at once, by consent.

Mr. Golden: Yes, if the other right is determined at the same time.

The Court: I think I will let them take their testimony upon this point for future possible use. I will say I am unable to see how it is going to become material. It certainly does not assist in construing the contract. If you wish to take it in my presence I will sit, and permit you to do so, but it is not to be used until you show for what purpose it is taken. Neither counsel have indicated what relief this testimony is germane to. Supposing I should conclude that half the amount of water designated in the certificate is sufficient, then what relief are you going to base upon this testimony, assuming it is favorable to you?

Mr. Haga: In the nature of a defense to any relief that they may ask.

Mr. Hays: If the Court please, we will not recall Mr. Wayman, but will take the testimony of

other witnesses who have come from a long distance, and we will be done when we are through with that, and will be ready to close. The rest of the depositions we will take on Monday. Perhaps in the meantime we may be able to get it closed down to a very brief form.

Mr. Longley: We ask in our prayer, among other things, that this contract, the settlers' contracts, and the State contract, be specifically enforced as to the defendants in this action. Now, the proof offered in addition to the contracts amounts, as we believe, to a showing that the defendant company, both the Land & Water Company and the Canal Company, being in the control of the Land & Water Company, have refused to give us the performance to which we are entitled under the terms of our contract. In other words, they have failed to supply us with the water we purchased. And as a consequence we ask that they be compelled to do so. I desire to call your Honor's attention to a case decided by the Supreme Court of this State within the past year, and reported in the 141 Pacific, at page 77, being the Childs-Neitzel case. That was an action brought by certain water contract holders, or rather in which certain contract holders intervened, for the purpose of compelling, among other things, the specific performance of their contract, alleging, and the evidence tending to prove, that the company had failed and refused, as in this case, to give them the water right they were entitled to under their contract, asking that a receiver be appointed, and that the receiver

collect the amounts due upon these contracts, for the purpose of so completing the system, or at least of giving the intervenors, the water contract holders, the relief to which they were entitled under the contract, the specific performance of their contract. And without reading the opinion in full, I desire to read a certain paragraph of the opinion filed on rehearing, which perhaps has some application to the matter here before the Court. Counsel for appellant contend that the Court erred in directing the specific performance of the contract for the completion of the system. Now, while there is no claim here that the system has not been completed, perhaps, we do claim that the object and result to be attained by the completion of the system has not been brought about or given to us, that is, the furnishing and supplying of the water right, and that was the situation in the Childs-Neitzel case. It was upon completion of the system that the water right was to be secured for which these persons were expected to pay.

“This objection is predicated upon the general rule that contracts for erecting buildings or doing construction work will not be enforced specifically by a Court of equity. The reason for that general rule is that the enforcement of such contracts would cause the Courts great inconvenience, but there is no question but that Courts of equity have jurisdiction to require the specific performance of such contracts if they conclude it is necessary to do so in order to protect the rights of the parties. If a Court of equity is without authority to specifically enforce contracts

in question, the water users would have no remedy by which they could protect their rights. There would exist a wrong without a remedy, and that is contrary to the well recognized maxim that equity will not suffer wrong to be without a remedy."

The wrong in this case is obvious. They have sold water rights in excess of the supply, in other words, have violated the terms of the contract with the State. And we say that it was incumbent upon them in the first instance to know the available water supply, and contract accordingly. In any event, they agreed not to do the very thing they have done, as the evidence will disclose in this cause. Here is the situation which confronts us: "It would be a grievous wrong to the owners of contracts for water rights to be compelled to pay for such rights and have no remedy whatever to compel the contracting party to furnish them water." That is the situation we find ourselves in, and we want to make those payments, as heretofore suggested. That they are attempting to require us to pay is evident by the fact of at least two foreclosures in this Court, brought for the purpose of foreclosing what they claim to be a lien upon the water rights or land involved in this action, and yet in view of the proof here we are confronted with the difficulty apparently of finding some remedy for that obvious wrong. It seems to me that the Court can, within its jurisdiction and equitable powers, make an order here which will give to these complainants and all others who may be entitled to receive the relief, the specific water rights which

they bought and are expected to pay for. Now, the Court may say to us that it declines to enter an order here, for the reason that the power of the Court in that respect is not clear. Nevertheless, the demand has been made this spring upon these water contract holders to pay. And there is another thing in that respect which should be brought to the attention of the Court. The contract itself provides that no water shall be delivered or distributed to the contract holders as long as there is any deferred payment due, any delinquent payment, and, that being true, we are placed in the position of having to pay right along in order to secure any water, and yet we are paying for something, because of the terms and conditions of the contract, which confessedly we can't get. And for that reason I say that it would seem that, assuming the facts to be true, which I have urged, we would be entitled to the relief suggested. In other words, the statement of this Court, the decree or order of this Court, that the contract, insofar as the complainants are concerned, and for all others similarly situated—and in that connection we have brought this bill for and on behalf of all contract holders—their rights up to a certain point at least are identical in interest—that such contract holders be and shall be entitled to receive the specific amount of water nominated in this water contract, and then shall pay to the officer of this Court, not outside of the jurisdiction of the Court, but keep the fund in this Court until this system is completed, in other words, this contract is performed. This is

the situation we find ourselves in. There is a manifest wrong, and it is to be continued, and the claimed rights of the assignee here are being asserted every day, and yet we seem unable for certain reasons to get the relief which should be an absolute protection as against paying for anything we can't get.

The Court: Isn't there a distinction between these cases, Mr. Longley? Assuming all you claim to be true, both as to the facts and the law—I did not intend to question the power of the Court specifically to enforce a contract of this general character; that wasn't the difficulty in my mind; but in the Childs-Neitzel case, as I understand, the Court simply held that the Court would see that the contract was carried out, by completing the system, but the company here apparently has now done all that it can do. The Court, of course, can't compel the defendant to do an impossible thing. If the water isn't available, if the water is not there, and that is the deficiency of the system according to your view, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending that the company has not a sufficient water supply to meet its contracts. Now, assuming that the water supply is insufficient, assuming that the contract should be

construed according to your contention, then what can the Court do? The Court can't require the defendant company to create water, it can't do that; it could compel it to build another lateral; it could compel it to raise the dam to a higher point; it could compel it to enlarge the main canal, and it could compel it to cut out this catch basin, as it is called, possibly. It could compel it to do anything that is practicable, or that is within the range of reasonable possibility, but how could it compel it to supplement the water supply which it has, and which you contend is insufficient?

Mr. Longley: I am making no contention of that kind.

The Court: Suppose the Court, through its officers, should collect the moneys that are due, or would, according to the terms of these contracts, become due from time to time, what could it do?

Mr. Longley: The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water supply to which we say we are entitled, and we ask in this case that this trust deed, insofar as it may be in excess of the water supply available, be cancelled, and that these defendants be enjoined from enforcing or attempting to enforce, or collecting or attempting to collect, the water payments due, until they give us what we have bought.

The Court: But suppose they never can do that?

Would you contend that they couldn't claim anything against you?

Mr. Longley: No, your Honor.

The Court: Then, how are we to determine that question?

Mr. Longley: Then I would say that for what they have furnished we should be compelled to pay. In other words, that there are certain lands here now, which can be cultivated each year, and receive substantially the water here contracted for, 30,000 acres.

The Court: That is the very question that arose preliminarily. How can I require the company, in the face of the provisions of your contract, to furnish all the water to certain contract holders and withhold it from others, especially when they are not parties to the suit?

Mr. Longley: The Court could require the company to do this: There are enough payments in default upon this water contract that it is within the power of the company now to cancel these water contracts. They should in any event, because having sold and issued contracts in excess of the amount of water supply, in other words, having violated the terms of the statute, they should bring themselves within the rights given them by the law.

The Court: Supposing I had John Jones here, who holds a contract. Now, upon what theory could I require him to give up his contract?

Mr. Longley: On this theory, your Honor: John Jones, while he may have made an entry upon the land, has never applied the water that he was entitled to to a beneficial use. Now, illustrating what I mean, I will take tract. At the present time there are practically 30,000 acres under cultivation, we will say, represented by 400 settlers upon the tract. Those settlers have been diligent in the eye of the law, because they have gone upon the land, they have made the settlement and the reclamation which the law requires, and they have applied the water to a beneficial use. John Jones has never gone upon the land, unless perfunctorily, and made some slight application of water to the land, simply for the purpose of preserving his rights under the law. Now then, here is a situation where he have 73,000 acres sold and 30,000 in cultivation, owned by settlers who have gone upon the tract and have been diligent, and who have applied all of the available water to the land, giving to each the amount of water he is entitled to under his contract, assuming that there is such an amount available. While it says in these contracts that there shall be no priority, a somewhat similar case was passed upon from Elmore County, in which the Court said that even though the contracts are issued, one beginning this morning and several today, and several tomorrow, and the day after, that the right of the contract holder is not determined by the priority of his contract with the construction company or irrigation company, but rather determined by his settlement upon the land, and the application

of the water to a beneficial use. Now then, as between John Jones and the 30,000 acres brought under cultivation, and upon which this water has been applied, if one of the two of those innocent parties must suffer under this contract, which one would it be in a court of equity? And I say, that being the situation, assuming that there was sufficient water for the 30,000 acres, and some one, in order to specifically enforce this contract, must suffer, then I say John Jones must fall, and his contract with him.

The Court: Of course there is much to be said in favor of that view, if the necessity arises, but here would be another question. Here is this long lateral that is spoken of, that provides water for the extreme western section. Now, suppose it should turn out that upon that tract there were comparatively few settlers who have brought their land under cultivation, and they are scattered, one on this lateral and one on another, for the Court to require them to furnish them water would mean a very great relative waste of water. I don't mean waste in the strict sense, but it would mean the requirement of a large volume of water to meet the comparatively small need. The efficiency of the water would be very low. There would be that consideration again as to whether or not the Court should require a large stream of water to be diverted for the use of a few settlers. That would be against public policy.

Mr. Longley: Perhaps so, and yet I don't know who could complain, certainly not the construction

company, because of the waste of water, because the situation is of their own making.

The Court: Suppose there isn't water enough for even all of the cultivated lands, then what?

Mr. Longley: Then, in my opinion, as between the persons who have applied the water, the doctrine of priority would determine absolutely their rights in the last analysis.

The Court: That couldn't be done without having the parties before me. I suggested at the preliminary hearing that if that relief should be asked for you should bring in the other parties, and you decided not to bring them in.

Mr. Longley: We attempted to find some way of bringing those parties in, but when we determined the cost of so doing, I am frank to say to the Court that we couldn't meet the expense entailed.

The Court: Suppose I were to order them brought in, who would pay the expense?

Mr. Longley: I am at a loss to answer that question, unless the trust fund which we ask for in the prayer would be used for that purpose. But here we have a situation which is manifestly wrong, and yet we seem, for the reasons suggested by the Court, to be without a remedy.

The Court: It isn't necessarily that you are without a remedy. It is a question whether I can grant any relief in the action.

Mr. Hays: Mr. Longley, would you be willing in this case to stipulate with us that the Court might

determine the duty of water, and that we adjust all other features of this controversy, what is right and fair for you people to have, and how?

Mr. Longley: I will not. I will stipulate that the contract shall fix the duty of water, and that the Court shall determine who shall be entitled to it.

The Court: This is clear, gentlemen. In the suggestion now made by Mr. Longley you are asking me in a sense to abrogate and rescind certain contract, and you are simply asking me to rescind these contracts for the benefit of certain other contract holders, on the theory that one class of settlers has shown more diligence than the other. If the Court has that power, the ultimate purpose should be to handle the whole situation, so as to do the least possible damage, the least possible injury, and then it would be necessary to know the duty of water, for if it turns out that you have contracted for more water than you need, the Court under those conditions would be inclined to give you only such amount as you need, and cover the difference by scaling down the contract price.

Mr. Longley: I would stipulate that, and will stipulate it right now. If the contract price will be scaled in proportion to the scaling of the water, we will proceed.

Mr. Hays: Are you going to scale it on this basis, or shall we leave this to the Court? That you scale it upon the basis of the injury done to you. In other words, that if you still have water enough for your

land, and we propose that kind of a plan of irrigation, and you still have water enough for your land, that you haven't lost anything.

Mr. Longley: No.

Mr. Hays: That might result in somebody being ultimately shut out, but that wouldn't necessarily result in any of them getting a less amount, but it might result in the other man getting shut out.

Mr. Longley: It is idle for you and me to discuss that. I would rather hear from Mr. Haga, he representing the persons who hold the security.

Mr. Haga: It doesn't seem to me that that question can possibly arise in this case. If we can proceed, and we are very anxious to dispose of some of the witnesses who are here at great inconvenience and expense, and if we can proceed to take their depositions now, I think we would come nearer getting together.

The Court: I will let you proceed in that way, and perhaps we will have some light upon what can be ultimately done. Have patents been issued to none of these lands?

Mr. Haga: There has been no application for patent, as I understand it, to the Government, for any of these lands.

Mr. Longley: The title to all of these Carey Act lands is still in the Federal Government.

Mr. Hays: There are some desert lands and scrip lands to which title has passed. There are some acres

of desert land on which the people proved up, and have got patent from the Government.

Mr. Longley: The taking of this testimony will work a great hardship upon the settlers' association, because of the expense involved, unless it would appear that it was necessary to take it.

The Court: This testimony is taken at the expense of the defendant now, that is, the testimony on the question of the duty of water now is necessarily taken at the expense of the party offering it.

Thereupon the depositions of C. H. Posten, John G. Boren, Joseph Boren, W. M. Worthington, W. F. Holt, J. P. Holmbran, G. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloan, William Wayman, E. B. Darlington, C. C. Thom, E. P. Senior and John Krall were taken under the circumstances and for the purposes indicated above.

The Court declined to permit the introduction of the evidence in said depositions and declined to consider the same herein, to which ruling the defendants excepted.

United States of America,
District of Idaho.—ss.

ORDER SETTLING STATEMENT.

It appearing that the within and foregoing statement of evidence, as amended, was lodged in due time with the Clerk of this Court, and that notice of such lodgment and of the time of the proposed settlement thereof was given to the solicitors for plaintiffs, and it appearing that the said statement is true, complete and properly prepared.

It Is Therefore Ordered, That the same be settled and allowed as a true, complete and correct statement of the evidence introduced in said cause, reduced to narrative form.

Dated this 29th day of December, 1915.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Dec. 29, 1915.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

DECISION.

June 29, 1915.

C. O. Longley and W. E. Golden, Attorneys for Complainants.

S. H. Hays, Attorney for Defendant, Twin Falls Salmon River Land and Water Company.

P. B. Carter, Attorney for Salmon River Canal Company.

Richards & Haga and McKeen Morrow, Attorneys for Commonwealth Trust Company of Pittsburgh and A. C. Robinson.

Dietrich, District Judge:

This controversy grows out of the construction of an irrigation system under the Carey Act, commonly known as the Salmon River project. The plaintiffs are severally in the possession of land upon the project, and hold what are called settlers' contracts for water for the irrigation thereof; they bring this suit not only for themselves but in behalf of all other settlers. The defendant, Twin Falls Salmon River

Land and Water Company, hereinafter called the Company, is the corporation which, pursuant to the Idaho Statutes, contracted with the State for the construction of the system and made agreements with the plaintiffs and others for water rights. It also issued bonds, to secure the payment of which it assigned as collateral these settlers' contracts to the defendant, Robinson, and executed a trust deed on all of its interest in the system to the defendant, Commonwealth Trust Company of Pittsburgh, as trustee. All of its property rights are thus hypothecated as security for the payment of its bonds, the interest upon which has for some time been in default. The defendant, Salmon River Canal Company, is the corporation organized as provided in the State contract and the settlers' agreements, for the purpose of ultimately taking title to and operating the system; as yet it is but the creature, and is under the control of the Company.

The contract with the State was executed April 30, 1908, and the opening for entry to holders of water right agreements of 80,000 acres of land was advertised for June 1, 1908; and when this suit was commenced the Company had executed numerous agreements for water rights covering an aggregate of 73,000 acres. The gist of the plaintiffs' complaint is not that the construction work has been improperly done, but that this acreage is greatly in excess of the area for which water is available, even during years of normal run-off. For that reason, they contend, the Company has failed to comply with the terms of

its agreements, and accordingly they are refusing to pay the installments due on account of the purchase price. The trustee and the collateral holder are demanding payment, and have brought several suits in foreclosure, which naturally have caused some irritation, and altogether much unrest prevails. While it is highly desirable that the controversy be fully and finally settled without delay, its immediate determination is attended with great, if not insurmountable, difficulties. The project is dependent for its water supply upon the Salmon River, a stream which, except during the flood-water period in the spring, is a creek rather than a river. And the chief feature of the project, therefore, is a reservoir, by which it was contemplated there could be stored, for use in the summer season, 180,000 acre feet. But in determining at the present time the available supply during an average year, we are not only confronted with the uncertainties inherent in an estimate of the probable run-off of a variable stream, but we would be driven to a measure of speculation as to what the normal loss, now very great, will ultimately be from seepage in both the reservoir and the canals. And in addition to this consideration the Company is presently engaged in litigation with other claimants, who assert a superior right to divert large amounts of water from the higher reaches of the stream and its tributaries. Moreover, when it is remembered that there are no other accessible water resources and that there is a provision in the contract putting all water right agreements upon an

equal footing regardless of the date of their execution, it will be seen that the question of an appropriate and feasible remedy is a most perplexing one, should it be held that the plaintiffs are entitled to relief.

The fundamental question is one of the meaning of the contracts. The issue here is a broad one. The plaintiffs contend that primarily they contracted for a water right of a definite amount, which incidentally carried with it ownership of an undivided interest in the system. The defendants say that only an undivided interest in the system was sold, which carried no specific amount of water, but only a divisional share, the extent of which must depend upon the ratio between the water actually available for the system and the aggregate number of contracts which the Company sees fit or is able to sell.

It is quite impracticable here to follow in detail the elaborate argument by which the defendants seek to maintain their position. It is not convincing. In the first place it is highly improbable that settlers would have signed a contract by which they must obligate themselves to pay at the rate of \$40.00 per acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system concerning the capacity and efficiency of which they could, in the nature of things, have but little information. As is well known, those who buy water rights upon these projects are generally men of small means, without irrigation experience, widely scattered, and often residing a long distance away. They

are not directly interested in the project as a whole, but they want to know what 40 or 80 or 160 acres of land will cost with an adequate water right. They have no means of determining whether a proposed reservoir will hold water, or whether the water shed is sufficient to fill it; these are matters peculiarly for the Company to investigate. Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the Company would give no promise of a sufficient supply, no assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole, and no guaranteed limit upon the number of acres for which water rights would be sold?

Upon the other hand, as bearing upon the probability or improbability of the willingness of the Company to sell a specific right or a definite quantity, it had full confidence in the adequacy of its supply. In a printed circular setting forth the advantages of the project, we have, among others, these statements: "Water supply of the best and in abundance

* * *. The water supply * * * is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve. The water right is perfect, and there is no land susceptible of irrigation above the Salmon tract, and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation

of this amount of land for the full season." It will thus be seen that no doubt was entertained of an abundance of water, and if it was confident of a supply sufficient in normal years for 150,000 acres, there is no apparent reason why it should not, for the purpose of selling rights for 80,000 acres, make its contracts attractive by incorporating therein an undertaking to furnish a comparatively small specific amount; with such a margin of safety there could be no substantial risk.

Now as to the contracts themselves. A printed form was prepared by the Company and offered to the public, which is the form held by the plaintiffs and all other settlers. This recites the incorporation of the Company, its execution of the State contract, the commencement of construction work, notice from the State Land Board that it (the Company) might proceed to sell or contract rights to the use of water, and thereupon it is agreed that in consideration of the payment of a certain amount of money, and the covenants on the part of the settler, the settler "shall become entitled to.....shares of the stock of the Salmon River Canal Company, Limited, the certificate thereof to be in form as follows:"

".....Shares.190..

This is to certify.....is the owner of.....shares of the capital stock of the Salmon River Canal Company, Limited.

This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:

.....
in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said Company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED,
By....., President.
Attest:, Secretary.”

Then follows a clause dedicating the water right to the land described, and to none other. There are numerous other provisions touching the manner and times for paying the purchase price and maintenance charges, the temporary operation of the system, and other subjects not relevant to the present inquiry. The irrigation season is defined to be from April 1st to November 1st of each year. Certain other clauses which may be deemed to be pertinent, are as follows: “Said certificate (that is, said certificate of stock) to be delivered as provided for in said State contract and under the conditions therein stated. * * * This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the

shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited. * * * This contract is made pursuant to and subject to the contract between the Company and the State of Idaho, and the existing laws of said State."

The import of the instrument, standing alone, as it would be understood by an intelligent layman with no preconceived notions of its meaning, is not open to debate. It is a contract for the sale of a specific water right of one-hundredth of a second foot per acre for each acre of land described, and as an incident thereto a proportionate interest in the irrigation system. The holder of a certificate of stock, so the contract reads, is entitled "to receive one-hundredth of a cubic foot of water per acre," and "a proportionate interest in the dam, canal, water rights," etc. The defendants' contention wholly ignores the first of these co-ordinate clauses, and limits the right granted precisely to the second. But the clauses are neither inconsistent with each other nor identical in meaning, and no reason is apparent why they should not both be given effect. If the suggestion be made that in form the contract provides only for the transfer of the certificate of stock in the Canal Company, and does not in terms convey a water right at all, the answer is that the technical form is quite unimportant. The clear purport of the entire instrument is the sale of the water right, and that is undoubtedly the sense in which the Company expected it would be understood, and in which it was understood by the settler. One of the preliminary recitals is that the State Board had notified the Company

that it could proceed to sell, not certificates of stock, but water rights; and paragraph three reads: "The consideration for the water rights hereby agreed to be conveyed is the sum of \$.," etc. It will not be assumed that the instrument was cunningly drawn to deceive the unwary, "to keep the word of promise to the ear and break it to the hope."

By itself the settler's contract thus appears to be unequivocal, and we next inquire whether its apparent import is materially qualified by its references to and adoption of the state contract. Doubtless the two instruments must be read together, and in some respects the one is to be deemed the complement of the other. But it is to be borne in mind that the settlers' contracts are subsequent in time to that of the state, and insofar as they clearly and fully express the agreement of the parties upon a given subject they are controlling, provided, of course, they contravene no statute of the state or of the nation. In this connection it is not to be overlooked that the state contract expressly provides that the Company may at its option contract to sell rights upon terms more favorable than those which it prescribes. But were a different view to be taken, is there anything in the state contract so opposed to the idea of a water right of a definite amount that it must be held to render the granting clause in the settler's contract inoperative? The first paragraph binds the Company to build the system, "and to sell shares of water rights" therein, "*and also* to transfer the ownership," etc., of the system to the settlers—a general plan entirely in har-

mony with the settler's contract. By paragraph two the Company is required to supply a reservoir capacity of 180,000 acre feet, and a canal capacity of one-hundredth of a second foot for each acre of land sold. In paragraph four there is an apparent difficulty, not, however, strictly in relation to the proposition of a definite water right; a specific amount is suggested which does not appear to correspond with that called for by the settler's contract. The paragraph recites that the Company holds a permit for the appropriation of 1500 second feet of the waters of Salmon River, and thereupon the statement is made that it "has been determined" that the natural flow of the stream, supplemented by a reservoir capacity of 180,000 acre feet, will be sufficient to provide "two and three-fourths acre feet of water per acre for each acre of land to be irrigated." Thereupon follows a reiteration of the obligation of the Company to construct canals of a sufficient capacity for one-hundredth of a second foot per acre. Now assuming a continuous flow of one-hundredth of a second foot per acre throughout the entire period from April 1st to November 1st of each year, there is a want of correspondence between two and three-fourths acre feet and one-hundredth of a second foot, for a flow of one-hundredths of a second foot would deliver two and three-fourths acre feet in approximately four and a half months. But it may very well have been understood that while the nominal irrigation season extended from April 1st to November 1st, as a matter of fact the actual season is much shorter, and in that view the discrepancy is more formal than real.

In paragraph six it is agreed, upon behalf of the state, that no application to enter land will be approved unless the applicant shall have entered into a contract with the Company "for the purchase of sufficient shares of water rights" for the irrigation of the land, "said shares or water rights to be evidenced by the stock of the Salmon River Canal Company,"—language which makes additionally clear the fact that the Company was selling water rights, not merely certificates of stock in another corporation. In the same paragraph is found an agreement that priority of application for water rights, or priority of entry and settlement, shall not confer upon the settler priority of right in the use of water. This stipulation is not to be taken as implying an understanding that water rights might be sold in excess of the normal capacity or serviceability of the system, for it is to be read in connection with another clause in the same paragraph providing "that to the extent of the capacity of the irrigation works and to *the extent of the water rights to which it is entitled*" the Company shall sell or contract to sell water rights; and the last part of paragraph nine, which expressly prohibits the sale of water rights "beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor." This provision against priority of right was doubtless inserted to cover seasons of abnormally low water, and to forestall the claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights, to the exclusion of later settlers, at any time when, due to such abnormal conditions or

to some casualty, there was insufficient water fully to supply all rights. In that view the several provisions of the contract are in harmony, and all are given effect; whereas, if the defendants' contention be adopted, not only is the express language of the settler's agreement set at naught, but the clauses last above quoted from the state contract are rendered meaningless. For if the settlers' contracts convey no specific water rights, but only undivided interests in the system, it is manifest that such water right as the Company possesses never could be exhausted or exceeded, for any right, be it large or small, is capable of division into an infinite number of shares.

In paragraph eight is found the following provision: "Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time, and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal." Standing alone this language is susceptible to a construction tending to support the defendants' contention; but it may also be read entirely in harmony with the settler's contract. Under the familiar rule that a printed form of agreement will be construed most strongly against the party by whom it is prepared, the doubt here would have to be resolved against the Company, even if we

had nothing but the state contract. And why, it is pertinent to ask, should the State have so carefully insisted upon a canal capacity of one-hundredth of a second foot per acre if the water was not to be supplied up to practically that capacity? It would seem to be wanton waste to build a canal twice the size needed. It is futile to say that an additional capacity might have been required for the rotation system of delivery, the possibility of which was contemplated, for, under such a system, the flow in the main canals and laterals is not necessarily variable, the fluctuation or periodic use is only in the sub-laterals and individual ditches.

In paragraph ten provision is made for the organization by the Company of the Salmon River Canal Company, and the transfer to it of the ownership and control of the system, and for the issuance to the settlers of a share of stock therein for each acre of land for which a water right is sold. The capital stock of the company, it is stipulated, shall consist of 150,000 shares, "which amount," such is the provision, "is intended to represent one share for each acre of land which may be hereafter irrigated from said canal." But while thus provision is made for the possible irrigation of 150,000 acres, there is no right or license implied to sell water rights in excess of the available supply of water, whatever that may turn out to be. Plainly the clause is to be read together with the limitation in that respect already discussed.

It is sought to attach significance to other language found in paragraph ten, to the effect that

water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine. By its very terms this provision is made to relate only to the period during which the Company shall have charge of the system, before it passes into the control of the water users. But putting aside that consideration, manifestly the regulation pertains not to the measure of the settler's water right, but only to the method of giving such right its greatest efficiency. Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as one-hundredth of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally recognized as being necessary, and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot. It is reasonable to assume, therefore, that both the officers of the Company and the State Land Board realized the necessity of adopting economical methods for distributing and applying the water, if the allotment of one-hundredth of a second foot was to prove sufficient and satisfactory. Undoubtedly rotation of use is superior to the more primitive method of continuous flow, and therefore the Company was authorized, so long as it remained in control, to establish such system, and accordingly to deliver the water to which the settler was entitled at such times and in such quantities as would best supply his needs; but in thus providing for an efficient method of delivery no authority was implied to reduce the aggregate

amount or volume to which the settler is entitled. Therefore the provision, even if it could be regarded as of continuing force, in no wise tends to qualify the settler's right as the same is defined in his contract.

Perhaps in greater detail than the reasonable length of a judicial opinion would ordinarily warrant, I have now brought under review all the clauses of the State contract which can be deemed to give even the most remote support to the defendants' contention; and it is submitted that they present no real conflict with the settler's contract. Upon the other hand, we find upon further examination that in its most vital feature the precise language of the latter is expressly authorized by the former, for in paragraph ten of the State contract it is directed that "the certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated, as provided in paragraphs IV and VIII of this contract, and a proportionate interest in the said canal and irrigation works, based upon the number of shares ultimately sold therein." Moreover, by its reference to paragraphs four and eight, this provision illuminates their meaning and brings them clearly into harmony with the settler's contract. It is accordingly concluded that the theory of a sale only of undivided interests is untenable.

Now shifting their position, the defendants say that if anything more than an undivided interest was

sold, it was not a specific amount of water, but only a right to use such quantity from time to time as might be reasonably necessary to supply the settler's needs. Such presumptively must have been the intention of the parties, so it is argued, for a contract for a definite water right, if not in contravention of the constitution and statutes, is opposed to the policy of the State, in that the only right the individual can acquire in water is the right to apply it to a beneficial use, and inasmuch as needs are always variable and fluctuating, title to a definite or specific quantity of water cannot be granted or acquired. Such plausibility, however, as the reasoning may have is due to a confusion of terms, and a consequent confusion of ideas. It may be conceded that the waters of the State belong to the public, and that the private right which the individual acquires by appropriation or purchase is usufructuary only, and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use. But this is not to say that in the exercise of ordinary prudence the owner of land may not, by appropriation or contract, provide himself with an available supply which shall be subject to his demand at all times when he has need therefor. Were the defendants' contention to prevail, the existing uncertainty and unstability of titles to water rights would give place to utter chaos. If, for the reasons counsel advance, it was incompetent for the settler to contract for a specific right, it was equally

incompetent for the Company by appropriation to acquire any specific or definite right. Water decrees adjudicating the extent of appropriators' rights would be of no effect, and that which the defendants are urging here, namely a determination of the duty of water, would be an idle thing, for what the farmer needs this year for the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree of State Engineer's permit. The possibility that the settler may not at all times be able to use the maximum of his available right, whether such right be acquired by appropriation or by contract, is without significance. That is only to say that, in that event, and for the time being, the water becomes subject to use by others having inferior rights. I know of no consideration of public policy opposed to the exercise by farmers of that degree of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies. What would be thought of a hydro-electric company furnishing light and traction facilities to an urban community, if it relied upon a power installation just sufficient to meet the needs of the community in normal years, without any margin of safety to cover the contingency of low water or of casualties known to be incident to such an enterprise? If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average,

or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. Economy of use is not synonymous with minimum use. Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

Now if the contract is lawful, and if therefore the Company could and did contract for the sale of specific rights, and if such rights were not to be sold in excess of the water supply, what is the quantitative measure, if any, provided by the contracts for such rights? We have seen that the sale was of "one-hundredth of a second foot" to the acre, and ordinarily, it is to be conceded, if this phrase were used with reference alone to a water right in the natural flow

of a stream, it would be accepted as a sufficiently clear and complete description in itself. It would impart a right in the owner at any time he had need, and so long as he had need, to divert and use a stream of the magnitude thus described. The question of the quantity of water, in cubical measure, would rarely arise, for no one would be interested in calling it up. But here the outstanding feature of this system is the reservoir, and obviously in estimating the acreage capacity of a reservoir we must not only have the size of the stream to be delivered per acre, but also the length of time it is to run. Upon this point of time, it must be conceded, the contracts taken together are not wholly free from ambiguity. If we dismiss, as I think we may, without discussion, the idea that either party has the power to determine the period to suit himself, there are left three possible alternatives. We may couple the one-hundredth of a second foot with the duration of what is designated as the irrigation season, that is, from April 1st to November 1st of each year, and conclude that the settler is entitled to receive a total quantity of water equal to continuous flow at the rate of one-hundredth of a second foot per acre for the entire season, which would amount to approximately four and one-fifth acre feet. In this view the settler who uses no water during the months of April and May could double the supply to which he would ordinarily be entitled during the months of June and July. While the language of the contracts is susceptible to such a construction, it is doubtful whether at the time they

were executed any water rights had ever been so defined in this section of the country, and it is wholly improbable that either party contemplated such a radical departure in irrigation practice.

A second view is that we may reject the period of the irrigation season as not having anything to do with the question of the quantity of water, but only as establishing the limits of time beyond which no water could be furnished, and adopt the theory that one-hundredth of a second foot was to be delivered during this period at such times only as the settler's need required, without the right on his part to hoard or save for the future by failing to use continuously, and hence without the right at any time to demand a flow in excess of one-hundredth of a second foot per acre. Such a right would be closely analogous to that of one who, as an original appropriator, is decreed at the rate of one-hundredth of a second foot per acre of the natural flow of the stream; he would have the right to divert that amount continuously up to the limit of the beneficial use to which he could apply it, but he could not, by refraining from use today, divert twice the amount tomorrow. The difficulty about this view is that it fails to take account of the necessity of measuring the reservoir, and hence leaves hopelessly uncertain one factor essential to the computation of the required capacity of the system as a whole. But not only here is that one of the vital questions, but it is reasonable to suppose that the parties had it more or less definitely in mind when they entered into the contracts.

A third view, and one which in many respects is identical with the one just discussed, but which covers the point last noticed, is that a right was contemplated sufficient to enable the settler to receive water at the rate of one-hundredth of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be two and three-fourths acre feet; and this view I am inclined to adopt. It is not at variance with any of the terms of the contract, it gives a measure of effect to all, and is in conformity with current and general irrigation practice in the State, with reference to which it may be assumed the parties contracted, and furthermore entails no unreasonable results. The parties doubtless understood that while it is provided that water could be demanded at any time between April 1st and November 1st, demands in April and October would be exceptional, and in May and September generally very light and that it was therefore reasonable to assume that on the average a resource of two and three-fourths acre feet would be sufficient to supply the settler's right of a continuous flow during the irrigation period, of one-hundredth of a second foot per acre. Practically, therefore, and in effect, the provision in the State contract with regard to the two and three-fourths acre feet is not inconsistent with or a limitation upon the definition of the settler's right embraced in his contract, namely, a right to receive one-hundredth of a second foot during the season of his need for water; it is merely the express-

ed understanding of the parties touching the total amount of water the Company must have available in order safely to provide for this need and thus to comply with its contract. In effect it amounts to an agreement by the Company that it will make provision for that quantity, and an agreement upon the part of the State and the settler that such provision will be accepted as full compliance with the obligation to supply the settler up to the limit of his needs at the rate of one-hundredth of a second foot per acre during the entire irrigation season from April 1st to November 1st. In this way upon the one hand the right of the settler is defined, and upon the other the duty of the Company is made clear and specific. The latter could not legitimately sell water that it did not have, and when at the rate of two and three-fourths acre feet per acre it had sold up to the available supply in its reservoir, as supplemented by the natural flow of the stream during the irrigation season, it was bound to stop.

There is no force to the argument by which the defendants attempt to array against this view the provisions of paragraph ten of the state contract, authorizing rotation of use, and delivery "in such quantities and at such times as the condition of the crops and the weather may determine." Note has already been made of the fact that these provisions are temporary only, and are in terms limited to the brief period of the Company's control and administration of the system, and the whole argument might properly be dismissed with the suggestion

that we are led into confusion rather than into clarity of reasoning by doing violence to the language of the contract and arbitrarily assuming that these provisions are upon the same footing with others of a permanent character. But if for the sake of the argument we join with the defendants in indulging this unwarranted assumption, the general conclusion here reached is in no wise affected. It is plain that the two classes, the one providing for one-hundredth of a second foot per acre, and the other for "such quantities * * * as the condition of the crops and weather may determine," if relating to the same subject matter, cannot stand together; one is constant and the other variable, and plainly as measures of a single right or duty they are inconsistent. The one must be understood to pertain to the extent of the right and the other to the method of delivery. But how can we say that the settler's right is the right to receive such amounts of water and at such times during the irrigation season as the condition of his crops may require, and at the same time say that the water is to be delivered to him at the rate of one-hundredth of a second foot per acre? That would be a contradiction of terms. Upon the other hand, to say that the right is to receive water at the rate of one-hundredth of a second foot per acre, flowing continuously during the actual irrigation season, the amount thereof being estimated at two and three-fourths acre feet, and that this amount be delivered from time to time in such quantities as the conditions require, is to define the right and to prescribe a method of delivery involving no

contradictions or inconsistencies, and no departure from the best irrigation practice. As already noted, this latter view is the only one under which these clauses in paragraph ten, treated as permanent provisions, can be given effect without rendering inoperative other clauses of the contract, and in this view they are in no wise opposed to the theory of a definite and specific water right. It is scarcely necessary to add that if the view I have taken of the meaning of the contracts is correct, the duty of water, when applied in accordance with principles which are coming to have the sanction of scientific experimentation, is an immaterial inquiry. The rights of the parties are defined by their written agreements, and even if upon investigation we should find, in harmony with the popular view, that one-hundredth of a second foot is quite inadequate, no relief upon that account could be granted to the plaintiffs. So upon the other hand, and for like reasons, a finding that the settler could get along with something less than that amount would not furnish ground upon which to relieve the defendant company from its contractual obligations. Whatever may be the proper duty of water, we cannot make a new agreement for the parties. If the right granted is too great, and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain; it is no concern of the defendants. The terms of the agreement were fixed by the Company, not by the settler; presumably the latter was induced to obligate himself to pay the price in the expectation that he would get the prom-

ised water service. It may be assumed that at the time the contracts were negotiated the Company deemed it impracticable to adopt a higher duty for water, and thought that few would be willing to undertake to reclaim the land, and in many cases to risk their all, without the assurance of at least the supply agreed upon. They are entitled to receive what they contracted for. It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings. Possibly knowledge of what at the time they were executed, was generally understood to be a reasonable amount of water for irrigation needs might be of some assistance in determining the meaning the parties attached to the phraseology employed, but manifestly the present views of scientific experts and skilled specialists cannot be considered for that purpose, and in that view the evidence was excluded from present consideration.

To summarize, the contract, as I have construed it, runs counter to no provision of the constitution, no statute, and no principle of public policy. The right provided for is no more specific than that defined and established by a judicial decree or by a proceeding before the State Engineer in favor of an original appropriator. The construction no more authorizes or permits wasteful use than does a decree or a State Engineer's permit. It eliminates inconsistencies and gives effect to all the provisions of the agreements. Not only is it in accord with the plain import of the language employed, but it is strongly supported by the surrounding circumstances. As we have seen,

the Company had confidence that the stream would supply a sufficient amount for 150,000 acres, and it procured a permit sufficient to provide at the rate of one-hundredth of a second foot per acre for that area. At that time water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and with rare, if any, exceptions, the amount deemed to be necessary, both popularly and by the courts, exceeded the amount here provided for. In the light of these circumstances the contract must have appeared to be a reasonable one for the Company to make, and no argument of improbability is available as a ground for qualifying the meaning which the phraseology naturally imports.

If then the settler is entitled to receive one-hundredth of a second foot or two and three-fourths acre feet per acre, it stands conceded that the Company sold, and has outstanding, contracts very greatly in excess of the capacity of the system. Just what this excess is I do not at the present juncture attempt to determine. Aside from the consideration that the period during which we have accurate information touching the run-off of the water shed is comparatively short, and therefore the data inconclusive, a definite finding upon this point should await the final determination of claims of other appropriators upon the stream, which are now in the course of adjudication in this court. Prior rights are asserted under these claims, and they are of such magnitude that no reliable computation can be made of the amount of water probably available for this project in normal

years, until their status and dignity are determined. It is also highly desirable, if not wholly indispensable, that we have the benefit of further experience and observation touching the amount of seepage which may be permanently expected in both the reservoir and the canals.

RELIEF.

While if the conclusions I have reached are correct plainly the settlers are entitled to a measure of relief, a feasible remedy is not so clear. The obvious course would be to require the Company to supplement its existing water supply, but additional water is not to be had. If it be suggested that the area of the tract be reduced by cutting off all contracts executed after the full capacity of the system had been sold, it is to be said that even should it be held that such a course is legally possible, it could not be taken without the presence of all the contract holders; furthermore, it is not impossible that some of those who contracted last have been more diligent in reclaiming their lands and placing improvements thereon than those who contracted earlier. So of the suggestion that all contracts be scaled down proportionately both in the amount of the water right and the consideration to be paid therefor, the practical difficulties are very great, and we have not before us the contract holders, who are admittedly indispensable parties to such relief. The Company should, of course, sell no more rights, and, if it be necessary, should be restrained from so doing. Furthermore, it should, insofar as may be practicable, call in such

outstanding contracts as are subject to rescission. It was represented at the trial, as I understood, that so many contracts had been abandoned, and so many others are subject to forfeiture, that the Company might, at its option, reduce the aggregate of the outstanding contracts from approximately 73,000 acres to approximately 55,000 acres. It should be required to exercise its right of rescission wherever it exists, and by negotiation it is reasonable to believe, it may further reduce the irrigable area. It should also be restrained from attempting to collect overdue installments on contracts until there is reasonable assurance that the settlers will receive that for which they have promised to pay. For the present at least I do not look favorably upon the prayer for a receiver. The system is apparently being carefully and intelligently managed, and no relief is needed in that respect. The suggestion that a receiver collect the installments due, for the purpose of creating a fund out of which to pay damages, if feasible at all, does not impress me as being presently necessary. An order or an interlocutory decree will be entered restraining the Company from making any contracts or waiving any right of forfeiture of existing ones, and also restraining it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers have been provided with the water supply contracted for, or are given trustworthy assurance that it will be provided. Leave will be granted to either party to make application at any time for the introduction of further

proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the Vineyard Company suit hereinbefore referred to and now pending in this court; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water contracts actually outstanding at the time of the application; and, upon the submission of such proof, for the entry of a final decree.

Endorsed: Filed June 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

NOTICE.

To the Plaintiffs and Their Attorneys:

Please take NOTICE that the defendant herein will on the 29th day of October, 1915, at 10:00 o'clock A. M. of said day move the above court at the court room thereof for leave to introduce further proof herein in order to explain the terms and conditions of the contract between the State of Idaho, and the Twin Falls Salmon River Land and Water Company dated April 30th, 1908; that said application will be made upon the records and files of this court and upon affidavits hereafter to be filed.

RICHARDS & HAGA,

S. H. HAYS,

P. B. CARTER,

Attorneys for Defendant,

Residing at Boise, Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

AFFIDAVIT OF S. H. HAYS ON APPLICATION
FOR REHEARING AND REOPENING OF
THE CASE.

State of Idaho,
County of Ada,—ss.

S. H. Hays being first duly sworn deposes and says that he is the attorney for the Twin Falls Salmon River Land and Water Company, one of the defendants herein; that he drew the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company dated April 30th, 1908.

That during the years 1899 and 1900, affiant was Attorney General of the State of Idaho, and as such ex-officio a member of and secretary of the State Board of Land Commissioners of said State.

That in the year 1899, as a part of his official duty as such Attorney General, and in connection with the State Engineer of the State of Idaho, there was prepared a compilation of the irrigation laws of the State of Idaho, a set of regulations for the use of the State Land Board and State Engineer's office in relation to the Carey Act and a form of contract which persons or corporations proposing to construct irrigation works under the terms of what are known as the Carey Act should enter into; that this form of contract, in substance, was presented to affiant by D. W. Ross, the then State Engineer of the State of Idaho for approval as a part of the regulations of the State Engineer's office to be adopted in conjunction with the State Land Board; that said form of

contract was a form of contract which had been procured by the said State Engineer from the State Engineer of Wyoming; that after some changes and modifications, the form of contract was approved by affiant as such Attorney General, and the regulations duly issued by the State Engineer's office and by the State Land Board; that the form of contract at that time proposed for execution by companies constructing works under the terms of the Carey Act is hereto attached, made a part hereof and marked Exhibit "A," and that the said form of contract is the same form that appears at pages 100 to 107 of the Rules and Regulations of the State Land Board and the State Engineer's office in relation thereto published in the year 1899.

That the first application for lands under the terms of the Carey Act in the State of Idaho was made by the American Falls Canal and Power Company about the year 1895; that said application was consummated by the making of a contract between said company and the State on the 21st day of February, 1901; that a copy of the ninth paragraph of the contract so made is hereto attached, made a part hereof and marked Exhibit "B."

That the second application or proposal to irrigate lands under the terms of said act was made by the Mullins Canal and Reservoir Company about the year 1895 or 1896, and that said application was consummated by entering into a contract with the State of Idaho on the 20th day of February, 1902; that a copy of the ninth paragraph of said contract

is hereunto annexed, made a part hereof and marked Exhibit "C."

That said contracts with the American Falls Canal and Power Company and the Mullins Canal and Reservoir Company above mentioned were in substantially the form set forth in Exhibit "A."

That the third application made for the segregation of land and the building of irrigation works under the terms of the said Carey Act in the State of Idaho was made by the Twin Falls Land and Water Company and said application was consummated by entering into a contract on the 2nd day of January, 1903, with the State of Idaho, a copy of which contract is filed herewith and marked Exhibit "D."

That in the contract with the American Falls Canal and Power Company above mentioned, it was provided in the ninth paragraph thereof that persons purchasing shares or water rights in the canal system should have the use of at least two and one-half acre feet of water during each and every irrigation season.

That in paragraph nine of the contract with the Mullins Canal and Reservoir Company, it was provided that persons purchasing shares in the system should have a water right to the use of at least three acre feet of water to be delivered from the canal during the spring flow of the river in each irrigation season, but that during periods of scarcity, it should be delivered to the users in such heads and at such times as the condition of the soil, crops and weather might determine.

That at the time of the making of the contracts with the State above mentioned, and at all times since and at the time of the making of the contract with the defendant herein, it has been customary for the persons making the proposal to build irrigation works to present a list of the lands to be irrigated, together with a plan showing the mode of irrigation thereof, and to make a statement with regard to the water right and water supply claimed. Thereupon, it was the duty of the State Engineer to determine the sufficiency of the water supply and the feasibility of the plan presented; that the area to be irrigated has always been finally passed upon by the State Engineer and the State Board of Land Commissioners of the State of Idaho, the Engineer passing upon the amount of land that could be irrigated by the water supply available as provided by law and the State Land Board finally passing upon the entire proposal as provided by statute.

That Section 1615 of the Revised Codes was in 1899 and still is in force and effect and provided then as it does now, that the perpetual water rights which should be sold to settlers should

“embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.”

That in the making of the said contract Exhibit “D,” the form of the ninth paragraph was changed so as to omit therefrom any reference to the use of a certain number of acre feet of water, it being provid-

ed in said paragraph nine that the water should be delivered.

“in such quantities and at such times as the condition of the soil, crops and weather should determine”;

That said contract was drawn by affiant and was approved by the State Board of Land Commissioners of the State of Idaho, and that said provision providing for the delivery of a specific amount of water was intentionally omitted in accordance with what the contracting parties then believed to be the best irrigation practice; that prior to that time, it had been customary in many parts of the State of Idaho for the users of water to demand the continuous flow of a certain number of inches or second feet of water; that it was at the time of the making of said contract Exhibit “D” and for some time prior thereto, had been recognized that the best irrigation practice required a delivery by rotation; that the desirability of the rotation system had been set forth in the pamphlet containing the irrigation laws and the rules and regulations of the Land Board and State Engineer’s office hereinbefore mentioned at page 119 thereof.

That in making the segregation of lands under the application mentioned in Exhibit “D,” it had been proposed to irrigate 272,000 acres of land and for this purpose, a water right notice providing for the diversion of 3,400 second feet of water at the point of diversion mentioned therein was provided for; that it was understood at the time of the making of

said contract Exhibit "D" that the said contract meant that the canal system should be built of a size sufficient to deliver a head of water of one-eightieth of a second foot per acre, but that the water should only be delivered in such quantities and at such times as the condition of the soil, crops and weather might determine and according to the rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as would best protect and serve the interests of all the users from the canal system. That it was believed at that time by the parties entering into the contract that the provision in regard to the rotation system in effect made the beneficial use of water the measure of the right; that there was also another change made in the form of contract, it being provided in the form Exhibit "D" that a corporation made up of the settlers should be formed for the purpose of owning and operating the system as set forth in paragraph eight of said contract; that this company so formed by the settlers is commonly known as the Operating Company; that several contracts were entered into with the State Board of Land Commissioners by various corporations desiring to reclaim land under the Carey Act subsequent to the making of the contract Exhibit "D"; that one of the most important of said contracts was the contract entered into between the Twin Falls North Side Land and Water Company and the State of Idaho, a copy of which is filed herewith and marked Exhibit "E"; that in this form of contract, there were in substance two changes, to-wit: the Operating Company, instead of being

formed when the works were completed, was organized at the beginning of operations, and a provision was inserted providing that amendments to the contract might be made by the parties (see p. 22).

That as before stated the project of the Twin Falls Land and Water Company was organized for the irrigation of approximately 272,000 acres of land and for this purpose, a water right of 3,400 second feet was taken out, this amount being allotted to the entire area mentioned; that this amount was measured at the place of diversion from the stream; that in the making of all subsequent Carey Act contracts, the general form provided in the contract with the Twin Falls Land and Water Company, Exhibit "D," was followed, except in regard to the provisions as to the time of the organization of the Operating Company which was changed as shown in Exhibit "E." That upon these projects, the manner of procuring the water supply and providing for its use was as follows:

1. A water permit was taken out under the laws of the State and the practice of the State Engineer's office; that this water permit provided for the diversion from the stream of a certain number of second feet of water for the irrigation of a certain number of acres of land; that these water permits usually provided for the diversion from the stream of 1-80 of a second foot or 0.01 of a second foot of water *measured at the point of diversion* for each acre of land segregated.

In the case at bar, the water permit, No. 2659, provided for the diversion of 1,500 second feet for an area of land originally estimated at 150,000 acres.

2. That in providing for the administration and handling of this water supply, it was provided as it is in paragraph nine of the contract between the State of Idaho, and the Twin Falls Salmon River Land and Water Company, dated April 30th, 1908 (see paragraph ten), that,

“water shall be measured to users from the place of diversion at the main lateral of such irrigation system in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system.”

It was the purpose of this provision, as understood by the persons making the contract and of all the other Carey Act contracts, that rules and regulations should be made by the company for the use of the water supply and that water should only be delivered to a user at such times as the crops and weather might require under a rotation system instead of under a system of continuous flow. It was intended and expected that in practice the water should be delivered to each user for the use of his crop as frequently as good farming practice required it and that at each delivery, so much water should be delivered as was necessary for the purpose. There was at the time

a fair understanding as to the number of times that grain, alfalfa and other crops should be irrigated and also as to the time necessary for each irrigation although much of the last named information was in crude shape. It had been understood, however, at the very outset when the Carey Act contract was first prepared in the form Exhibit "A," that it was probable that the average depth of the water required for irrigation was from two to two and a half acre feet in the Boise Valley where the altitude was approximately 2,600 feet, where the climate was warmer and the water requirements greater than in most sections of the State.

The State Engineer of the State of Idaho in his Biennial Report for the years 1899 and 1900 states at page 86 of the report as follows:

"I am free to admit that notwithstanding the two years' study of this question in the Boise Valley, we know but little regarding the actual duty of the water. To make observations to enable one to safely estimate the duty of a given volume of water would require a careful study of the subject extending over years. The general results obtained as shown by the table indicate, however, that it is possible to obtain a very high duty in this valley. From the observations made, I think we may safely estimate that the average depth required for irrigation here will be from two to two and five-tenths acre feet."

That it was in pursuance of the view thus expressed that it was provided in the contract with the

American Falls Canal & Power Company herein-above mentioned that the persons purchasing water rights should have the use of two and one-half acre feet of water during each irrigation season; that the provision for a certain number of acre feet of water to be delivered to a settler during an irrigation season was left out of the contract, Exhibit D, of the Twin Falls Land and Water Company intentionally for the reason that it was thought if a sufficient supply was appropriated from the stream for the use of the entire project and the settler was given a proportionate interest therein, that it was not necessary to make any further provision in view of the fact that the water supply was examined and approved by the State Engineer before the project was constructed and the belief that such a provision might interfere with the provision in regard to a rotation system and the delivery under rules and regulations of such quantity as was necessary; that it was expected in this way by the parties making these contracts that a very high duty of water would be obtained and the best possible manner of use provided; that inasmuch as the works were to go over to a private corporation which ultimately might operate them as they wished, it was made the duty of the Construction Company to establish the rotation system and to put such plan upon its feet in order that the settlers might have when they took the project over a first-class system and method of irrigation already in actual practice.

That agitation for a rotation system on canals was commenced about the year 1899 and has been

kept up ever since, such method being advocated with uniformity in all of the reports of the State Engineer; that taking up water for a Carey Act project was done in the same way as taking up water for an individual farm and that its use upon the project was compared with the use which might be made upon a large farm after it was cut up into smaller tracts as shown by the illustration used by the State Engineer of Idaho at page 122 of the pamphlet entitled, "Irrigation Laws of Idaho. Measurement and Distribution of Water for Irrigation," printed in 1899.

That the original promoters of the project here in question estimated that the water supply was sufficient for 150,000 acres of land and caused a water permit for 1,500 second feet of water to be taken out accordingly. That just prior to the opening of the lands for settlement on the first of June, 1908, and after the project had been taken over by the company constructing the works, it was arranged between the State Board of Land Commissioners and the company that the works should at first be built only for 100,000 acres and it was subsequently agreed between the parties that only 80,000 acres of Carey Act lands should be open for settlement and that at the time this was done, the basis of estimating the water supply was upon the delivery of 22 acre inches or 1.83 acre feet at the point of delivery to the farm.

That a certified copy of the original report of the State Engineer upon this project is hereto attached and made a part hereof.

That the years 1887 (or some say 1888), 1905 and 1915, have been years, as shown by the records, of abnormally low runoff on all streams in Southern Idaho as well as adjoining states; that the runoff of streams in other years have fluctuated to a great extent, but the above mentioned are years of excessively abnormal conditions.

S. H. HAYS.

Subscribed and sworn to before me this 29th day of October, 1915.

(Seal)

W. D. McREYNOLDS,
Clerk of U. S. District Court.

By PEARL E. ZANGER,
Deputy.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "A."

Contract.

This agreement, made and entered into in duplicate this.....day of....., 1900, by and between the State of Idaho, by and through..... Governor;Secretary of State;Attorney General;Superintendent of Public Instruction; composing the State Board of Land Commissioners of said State, party of the first part, and....., a corporation organized and existing under the laws of the State of....., party of the second part.

Witnesseth, That the State Board of Land Commissioners of the State of Idaho, composed as above stated, in pursuance of the powers and authority in

it vested by virtue of an act of the Legislature of the State of Idaho, entitled, "An Act to Provide for a State Engineer, Defining his Duties and Regulating his Compensation, and to Provide for the Acceptance by the State of Idaho from the United States of Certain Lands and to Provide for the Reclamation and Disposal of the Same": First enacted the Third Session of the said Legislature and approved March 9th, 1895, amended at the Fourth Session, said amendment approved March 3rd, 1897, re-enacted as amended at the Fifth Session of the said Legislature and approved March 2nd, 1899, after due consideration of a proposal filed with the said board by the said party of the second part to build and construct a certain irrigating canal, known as the in the Counties of, State of Idaho, did by a resolution adopted at a meeting of said board, held on the day of A. D. 19 . . . , resolve to enter into a contract with the said party of the second part to construct said canal and irrigating works upon the following express terms and conditions:

Purpose of Contract.

First: That for and in consideration of the covenants and agreements of the said party of the first part herein contained, the said party of the second part agrees to construct and build the said and its main laterals beginning at a point on the which point of diversion as well as the course and direction of said main canal are more particularly described and laid down on the map descrip-

tive of said canal and the lands herein described, which said map is hereto attached and made a part of this contract and marked "Exhibit," a copy of which is now filed in the office of the State Engineer; and to sell shares or water rights in the said canal system, from time to time, as will hereinafter be provided, to the person or persons filing upon the lands herein described, and to the owner or owners of other lands not described herein, but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms herein provided; and to transfer the management and control of said canal system to the said purchasers of shares or water rights in the manner as will hereinafter be provided.

General Specifications for the Construction of the Canal System.

Second: It is hereby agreed that the said party of the second part shall construct the said canal and lateral system according to the following specifications:

Capacity of the main canal:

Alignment of the main canal and main laterals:

Grades and levels of main canal:

Headgates and other structures:

Culverts:

Bridges:

Embankments:

Waste ways:

Lateral System:

Grades of main laterals:

Maps of canal and lateral system:

General: In all matters of location and construction of the said canal system, the permanency, utility and fitness of each and every part, with a due regard for economy, shall be the essence of these specifications, and all matters of location and construction not definitely fixed herein, shall be submitted to the State Engineer of Idaho for his approval.

Right-of-Way.

Third: The said party of the first part hereby grants to the said party of the second part a right-of-way across lands belonging to the State of Idaho, or that may be ceded to the State, for the construction and operation of the said canal and main laterals, which right-of-way shall be equal to the actual width of the said canal or lateral at its base or from toe to toe of the embankment of the same, together with a strip of land along one side of said canal or lateral and adjacent thereto, said strip of land not to exceed fifty (50) feet in width along the main canal and thirty (30) feet in width along main laterals and to be used for the purpose of a roadway.

Permit to Appropriate Water.

Fourth: As there has been issued to the party of the second part a permit to construct said, and to divert and appropriate the water of thefor the purpose of irrigation, power and other beneficial uses, said permit being numbered , and recorded in the office of the State Engineer of the State of Idaho, in book . . . on page and a permit for extension of area to be reclaimed under said canal numberedand re-

corded in the office of the said State Engineer, in book of enlargements, on page, the said party of the second part agrees to furnish and deliver through said canal, water sufficient to irrigate and reclaim such portions of the following described lands, together with such portions of other lands not described herein but which lie below the line of said canal, as are susceptible of irrigation and reclamation therefrom.

Entry of the Lands.

Fifth: Upon the completion of this contract and when the actual construction of said canal shall have been inaugurated, the State Board of Land Commissioners shall cause to be opened for settlement by advertisement as is provided by law, all that part of the lands herein described lying and being situate That when said canal shall have been completed to said as aforesaid, then the State Board of Land Commissioners shall cause to be opened for settlement in like manner, all of said herein described lands lying and being situate, and when said canal shall have been completed to said then the remaining portion of said lands shall be caused to be thrown open to settlement in the manner provided by law.

Application for the Entry of Lands.

Sixth: That said party of the first part, through its State Board of Land Commissioners as aforesaid, agree not to approve any application or filings on said lands until the person or persons so applying

shall furnish to the said board, as aforesaid, a copy of a contract entered into with the said party of the second part, for the purchase of sufficient shares or water rights in said canal and irrigation works to represent a carrying capacity as herein provided for the lands upon which said person or persons desire to file, nor shall the said board approve any such filing until it is satisfied that the said party of the second part has said canal and irrigation works constructed and in operation to such an extent that it can furnish the full allowance of water for the land upon which such person or persons may desire to file.

Price to Be Charged for the Lands by the State.

Seventh: That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described, to such persons as are by law entitled to file upon the same, for the sum of fifty (50) cents per acre, one-half of which shall be paid at the time application for the entry of such lands is made to the State Board of Land Commissioners, the remaining one-half of such purchase price to be paid at the time such person or persons shall make final proof as by law required.

Sale of the Canal to the Persons Filing on the Land.

Eighth: The said party of the second part hereby agrees to sell and convey by warranty deed to the person or persons filing upon said lands herein described, or to the owner of other lands not described herein, but susceptible of irrigation from canal, a water right or share in the said canal for

each and every acre owned, filed upon or purchased from the state. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-seventieth of a second foot per acre, and each share or water right sold and conveyed as herein provided, shall also represent a proportional interest in the said canal, together with all its rights and franchises, said proportion to be based upon the number of shares finally sold in the said canal, and such water rights or shares shall be sold to the person or persons aforesaid as follows: To the person or persons filing upon any of the lands herein described at a price not exceedingdollars per share, the same to be paid for as follows:; to the person or persons purchasing any portion of sections numbered sixteen or thirty-six or any other lands belonging to the State of Idaho which are susceptible of irrigation and reclamation from this canal and to which said water rights or shares are to be applied and dedicated at a price not exceedingdollars per share, the same to be paid for as follows:; to the person or persons owning other lands not herein described but susceptible of irrigation and reclamation from this canal and to which said water rights or shares are to be applied and dedicated, at a price not exceedingdollars per share, the same to be paid for as follows: It is understood, however, that in all cases any and all such payments may be made at any time in advance of maturity of the same at the option of the

purchaser of said shares in said canal. Provided, that in no case will water rights or shares be dedicated to any of the lands aforementioned, by the party of the second part, beyond the carrying capacity of this canal system.

Water Right Dedicated to the Land.

Ninth. The said party of the second part shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights to the land owner, or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer.

And it is further agreed that the water right so dedicated to the said lands shall be a part of and

shall relate to the water right belonging to the saidcanal, the terms of the deed dedicating the said water right to said land, together with all other contracts entered into between the said party of the second part and the said purchasers of shares, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchase of shares as are provided herein and in the act first mentioned in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Measurement of the Water and Charges for Its Delivery to the User.

Tenth: The said party of the second part agrees to construct and operate said canal and main laterals so that the water conducted through the same may be delivered at a point not exceeding one-half mile from any legal subdivision of one hundred and sixty acres of the land herein described, filed upon, owned or occupied as aforesaid, and to be irrigated or reclaimed by the water conducted through said canal and main laterals. That it will construct, place in position and maintain all headgates, flumes, weirs and other devices through which water may be turned off from said canal or main laterals; that the said party of the second part will construct and place in said canal or laterals such devices for measuring water to the irrigators, as shall be deemed necessary and best by the State Engineer of Idaho.

It is hereby agreed that every purchaser of shares in the said canal shall be entitled to have delivered

for the irrigation of his land, its full allowance of water as herein provided, and it is hereby stipulated and agreed that the party of the second part may make a charge for the delivery of said water for irrigation, to the purchaser of said shares, on the following basis and in the following manner: of the total quantity of water dedicated to his land shall be delivered free of all charges during the first irrigating season that water is delivered to the said purchaser of shares, but after the said shall have been delivered free of charge, a charge not to exceed cents per acre foot may be made for the delivery of each and every acre foot of water at the request of the said purchaser of shares to the full allowance of feet per acre for all the land owned or entered under the provisions of the Act first mentioned in this contract, by the purchaser of said shares, when for the delivery of each and every acre foot of water at the request of said purchaser, over and above the said full allowance, a charge not to exceed cents may be made. During the second season after the date of the said first delivery of water and during each season thereafter until the control and management of the said canal system has passed from said party of the second part as hereinafter provided, a charge not to exceed cents per acre foot may be made for the delivery of water at the request of the said purchaser of shares up to the said full allowance, but after said allowance has been delivered, a charge not to exceed cents per acre foot may be made for the delivery of each

and every acre foot delivered at the request of the said purchaser of shares.

*Status of the Purchaser of Shares—Indebtedness
Against Canal.*

Eleventh: It is hereby agreed by the party of the second part that the purchaser or purchasers of shares or water rights in the said canal, shall, by virtue of the ownership of said shares, become co-owners or tenants in common in said canal, and the relations of said purchasers to the said party of the second part shall be based upon the provisions contained in a contract for the purchase of said water rights or shares from the said party of the second part, but whenever, from time to time, water rights or shares representing the full carrying capacity of the said canal shall have been sold by the said party of the second part, the said party of the second part shall be entitled to increase the capacity of said canal or any lateral thereof, provided, that the said party of the second part shall sell, issue and dispose of additional shares or water rights to the full extent of said enlargement; provided, that the said enlargement shall be made before the time fixed in the contract for the completion of the said canal system; and it is hereby agreed that the said new shares shall be issued and sold according to the terms and conditions as hereinbefore provided, and be subject to the same conditions as will hereafter be stated in this contract.

It is further agreed that the said party of the second part, for the purpose of raising funds to con-

struct the said canal system, may execute a mortgage or deed of trust upon all its rights which it has or may hereafter acquire by virtue of this contract to any third party, provided that such mortgage or deed of trust shall be made subject to this contract, and provided further that such deed of trust shall contain a clause requiring the trustee or mortgagee, as the case may be, upon the payment to such mortgagee or trustee of the amount stipulated to be paid by any purchaser of water rights to thereupon give a full release to such purchaser for the amount of the water right so purchased by him; such mortgage or deed of trust to be subject to the approval of the Attorney General of the State of Idaho. All payments on water rights are to be made to the trustee or mortgagee, if any, but trustee or mortgagee may consent otherwise.

Transfer of the Management and Control of the Said Canal System to the Purchaser of Shares.

Twelfth: The said party of the second part agrees to maintain and operate said canal and lateral system at its own proper cost and expense until it shall have sold and dedicated water rights or shares in the said canal to.....per cent of the land herein described, susceptible of irrigation and reclamation, when it agrees to transfer to the said owners and holders of shares the control and management of said canal system, together with all the rights and franchises belonging thereto, and to transfer said canal and lateral system to said owners and holders of shares in good order; provided, that said transfer

may be made before the number of shares aforesaid in said canal have been sold, if the said party of the second part so elects, but when said transfer shall be made, the said party of the second part shall elect to donate or transfer to the owners and holders of shares in the said canal as aforesaid all its unsold shares therein or retain such unsold shares or any portion of them, on which shares so retained it shall be liable to assessment for the maintenance, repairs and superintendence of the said canal and main laterals to whatever proportional amount the number of shares so retained bears to the whole number of shares in said canal. Provided, that said transfer shall be made not later than years after the date set in this contract for the completion of the said canal.

Completion of the Canal System—Forfeiture.

Thirteenth: The said party of the second part agrees to begin work on the said canal within from the date of this contract; and to have completed and in operation miles of said canal and main laterals belonging thereto within a period of from the date of this contract, and to have the entire main canal and lateral system and all headgates, lateral gates, weirs and other structures belonging thereto, built in a good and substantial manner in accordance with the specifications herein provided and to the satisfaction of the State Engineer of Idaho, and to have said canal system in operation on or before five years from the date of this contract.

The said party of the second part agrees that upon a failure on its part to begin the construction of the

said canal within the time specified in this contract, or upon a failure to proceed with the work, as agreed upon in this contract, after receiving days notice from the secretary of the State Board of Land Commissioners, the bond given to secure the strict performance of the agreement herein contained, together with any portion or portions of said canal that may have been constructed under the conditions of the contract, shall be at once forfeited to the said party of the first part, the State of Idaho, and that the said party of the first part, acting through its said board of land commissioners, may declare the same forfeited, and proceed to enforce said bond and to take possession of said canal and irrigation works, and all the rights the said party may have acquired therein, as provided in the Act of the Legislature of the State of Idaho, first referred to in this contract.

Estimated Cost.

The estimated cost of the proposed irrigation works is

It is understood and agreed that the existing law under which this contract is executed is as much a part of this contract as if specifically herein set forth.

In witness whereof, the said party of the first part, the State of Idaho, has caused this agreement to be signed in duplicate by its Governor, Secretary of State, Attorney General, and Superintendent of Public Instruction, composing as aforesaid the State Board of Land Commissioners of the State of Idaho, and the said party of the second part has hereunto

caused its corporate name to be attached by its President, and attested by its Secretary, and its corporate seal to be affixed as well as a duplicate hereof, the day and year first above written.

For the State of Idaho:

By
Governor.

By
Secretary of State.

By
Attorney General.

By
Superintendent Public Instruction.

..... Company.

By
President.

Attest:
Secretary.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "B."

Copy of Paragraph Nine of the Contract between the STATE OF IDAHO and the AMERICAN FALLS CANAL AND POWER COMPANY, entered into February 21st, 1901:

Water Right Dedicated to the Land.

Ninth: The said party of the second part, shall, upon the sale of shares or water rights in said canal, as hereinbefore provided, dedicate the said shares or

water rights, to the land owned or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the Act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least two and one-half ($2\frac{1}{2}$) acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer.

And it is further agreed that the water right so dedicated to the said lands shall be part of and shall relate to the water right belonging to the said Bingham County and American Falls Canal, the terms of the deed dedicating the said water right to said land, together with all other contracts entered into between the said party of the second part and the said purchasers of shares, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchaser of shares as are provided herein and in the Act first mentioned

in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk.

EXHIBIT "C."

Copy of Paragraph *Nine* of the Contract between the STATE OF IDAHO and the MULLINS CANAL AND RESERVOIR COMPANY, dated February 20th, 1902.

Water Right Dedicated to the Land.

Ninth: The said party of the second part, shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights, to the land owned or entered by the person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the Act first mentioned in this Contract, by the person or persons purchasing said shares, shall have a right to the use of at least three (3) acre feet of water to be delivered from the said canal during the spring flow of the Malade River of each and every irrigation season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the user thereof may desire when the supply is plentiful; but during periods of scarcity, it shall be delivered to the users in such heads and at such times as the condition of the soil, crops and weather may determine,

and according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn or by rotation, as will best protect and serve the interests of all the users of water from this canal system. It is agreed that the said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer. The shares or water rights in the reservoir system shall in like manner be dedicated to the land upon which said water is to be applied, but the holder of a water right or share in said reservoir shall be entitled to have the water represented by said shares delivered to him in such quantities and at such times as he may deem necessary during the period from July 15th to August 31st of each year.

And it is further agreed that the water rights so dedicated to the said lands shall be a part of and shall relate to water right belonging to the said Mullins Canal and Reservoir system; the terms of the deed dedicating the said water right to said land, together with all other contracts entered between the said party of the second part and the said purchasers, shall be based upon the provisions of this contract and shall not contain a waiver of any rights of the said purchaser of shares as are provided herein and in the act first mentioned in this contract, but all such deeds and contracts shall meet the approval of the said party of the first part, the State of Idaho.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "D."

CONTRACT BETWEEN STATE BOARD OF
LAND COMMISSIONERS AND TWIN
FALLS LAND AND WATER COMPANY.

Dated January 2, 1903.

Contract.

This Agreement, made and entered into in duplicate this 2nd day of January, 1903, by and between the State of Idaho, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank W. Hunt, Governor, C. J. Bassett, Secretary of State, Frank Martin, Attorney General, and Permeal French, Superintendent of Public Instruction of said State, and the Twin Falls Land and Water Company, a corporation organized and existing under the laws of the State of Utah, the party of the second part, Witnesseth;

That, Whereas the party of the second part did heretofore, to-wit: on the 12th day of October, 1900, file with the State Board of Land Commissioners of the State of Idaho, a proposal for the construction of certain irrigation works in the counties of Cassia and Lincoln in the State of Idaho, under the provisions of the Act of Congress commonly known as the "Carey Act," and the acts amendatory thereof and the laws of the State of Idaho enacted in pursuance of the power granted by the said Act and, whereas at the request of the State of Idaho the lands lying under said irrigation works have been by contract

between the United States and the State of Idaho, dated July 1st, 1901, set apart by the United States in compliance with the provisions of said Act of Congress, said lands being List Numbered Six of the State of Idaho, filed at the United States Land Office at Hailey, Idaho, and more fully described in the contract above mentioned between the United States and the State of Idaho; and, whereas said State Board of Land Commissioners have duly notified the said party of the second part to enter into a formal contract for the construction of said irrigation works in pursuance of said proposal; said irrigation works being known as the Twin Falls Dam and Canals, and whereas said State Board of Land Commissioners did on the 2nd day of January, 1903, resolve to enter into a contract with the said party of the second part for the construction of said irrigation works, it is therefore mutually covenanted and agreed as follows:

Purpose of Contract.

First: That for and in consideration of the covenants of said party of the first part herein contained, the party of the second part agrees to construct and build the said Twin Falls Dam and Canals and their main laterals, beginning at the points of diversion particularly described and designated on the map descriptive of said canals and the lands herein described, which map is hereto attached and made part of this contract, marked Exhibit A, a copy of which is filed in the office of the State Engineer, and to sell shares or water rights in said canal system

from time to time as hereinafter provided, to the persons filing upon the lands hereafter described, and to the owners of other lands not described herein, but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms herein provided, and to transfer the ownership, management and control of said system to said purchasers of shares or water rights as hereinafter provided.

General Specifications for Construction.

Second: It is hereby agreed that the party of the second part shall construct the said Dam and Canals and Lateral system according to the following specifications:

The proposed point of diversion of the south side canal is situated north 30 degrees west 1329 feet from the southeast corner of Section 29, Township 10, South Range 21 East. The point of diversion of the north side canal is situated south 2 degrees 20 minutes west 2425 feet from the northeast corner of Section 29, Township 10, South Range 21 East.

General description of proposed works is as follows:

Dam: Water to be raised above its present level thirty-eight feet by closing the present three channels of the river by loose rock embankment or masonry or concrete dams, thereby forcing the water over two islands of solid lava rock, which will be blasted down to form a suitable crest and will give a free waterway of 815 feet. Rock embankment to be carried six feet above extreme high water, to have

a slope of 1:1 and to be backfilled with gravel or earth on slope 1 1-2:1.

South side canal: Total length about sixty-five miles. First section (from point of diversion to Rock Creek) eighty feet on the bottom, gradually narrowing to sixty feet on the bottom at Rock Creek. Slope of sides 2:1, depth of water ten feet, lower bank twelve feet on top; grade one foot to 5000 feet, capacity three thousand second feet. From Rock Creek to terminus bottom width gradually narrowed from sixty feet to fifteen feet, slopes 1 1-2:1, grades increased to two feet to 5000 feet at lower end. Rock work at head extends for one and one-half miles, estimated sixty per cent solid rock, balance of canal in earth until last twenty miles, where it is estimated fifty per cent of loose rock will be encountered.

North side canal: Total length about twenty miles. First section (being the first thirteen miles of the canal) twenty-five feet wide on the bottom, gradually narrowing to twenty feet at the end of thirteenth mile. Second section from end of thirteenth mile to terminus, gradually narrowing to ten feet in width at terminus. Slope of sides 1 1-2:1, depth of water 5 1-2 feet; grade 1 foot to 2640 feet, capacity 400 second feet. The first mile will be in heavy rock cuts, balance of canal in earth.

Structure: Both headgates will be built in solid rock. The main waste gates or spill ways will be located near the head of the canal in solid rock. All other waste gates, lateral gates and weirs will be of masonry or concrete.

Laterals: Approximately one hundred and twenty miles of main and three hundred and eighty miles of subordinate laterals are required with the necessary weirs and distributing gates. In case of variance between these specifications and Exhibit A, these specifications shall control.

Said dams, canals, laterals, gates, weirs and all other structures to be built and constructed in a workmanlike manner.

It shall be the duty of the said second party to file with the State Engineer of Idaho notes showing the size and the courses and distances from angle to angle of the canals and main laterals as soon as the same shall have been finally determined.

Changes may be made in these specifications from time to time by agreement between the State Engineer and said second party; such changes, however, not to impair the efficiency of the works for the purposes for which they are intended.

Said second party shall on demand of first party, furnish any further detailed specifications that may be required.

The main canals of this system shall have a carrying capacity when completed sufficient to deliver simultaneously one second foot of water to every eighty acres of land described in this contract, together with all other lands susceptible of irrigation from said canals as nearly as the same can be estimated and agreed upon between the State Engineer and the Engineers of the second party.

The plans, specifications and details for the construction of the dam, canals, headgates, weirs, etc., so far as the same are not covered by the above specifications, shall be submitted to the State Engineer of Idaho for his approval prior to the construction of any of said works, with the right of appeal by said second party from his decision to the State Board of Land Commissioners; but the work, when completed, shall be in accordance with the specifications as finally determined upon to the satisfaction of the State Engineer.

Right of Way.

Third: The said party of the first part hereby grants to the said party of the second part a right of way across lands belonging to the State of Idaho, or that may be ceded to the State, for the construction and operation of said canals and main laterals, which right of way shall be equal to the actual width of said canals or laterals at their base from toe to toe of the embankment of the same, together with a strip of land along one side of each canal or lateral, and adjacent thereto; said strip of land not to exceed fifty (50) feet in width along the main canal, thirty (30) feet in width along main laterals, and a proportionate width along smaller laterals.

Appropriation of Water.

Fourth: As there has been issued by the State Engineer to the party of the second part a permit to construct said irrigation works and to divert and appropriate from the waters of Snake River 3400

second feet for the purpose of irrigation, power and other beneficial uses, said permit being dated October 8th, 1900, the said party of the second part agrees to cause to be furnished and delivered to said canals all of said appropriated waters to irrigate and reclaim such portions of the following described lands, together with such portions of other lands not described herein, but which lie below the line of said canal, as are susceptible of irrigation and reclamation therefrom, and said second party hereby covenants and agrees that it has not done, suffered or permitted any act or thing by reason whereof the appropriation so made by it as aforesaid of the said waters of Snake River for the purposes of the irrigation and reclamation of lands through the system of works to be constructed hereunder has been or in future may be in any way impeached, clouded or impaired.

Entry of Lands.

Fifth: Upon the execution of this contract and when the actual construction of said canal shall have been inaugurated, and so far completed as to insure that said water will be furnished the hereinafter described lands, the State Board of Land Commissioners shall cause to be opened for settlement as provided by law, the following described portion or parcels of the land herein described, to-wit:

All of that portion of said lands on the southerly side of Snake River under said canal system that is shown on the map Exhibit A herewith, lying to

the east and south of the east line of section sixteen (16), township nine (9), south range nineteen (19) east, Boise Meridian.

Also all of the said lands on the northerly side the Snake River under said canal system as shown on said map Exhibit A.

That when said canal on the southerly side of Snake River shall have been completed to a point twenty (20) miles, measured along its course from the dam and head of said canal, then the State Board of Land Commissioners shall cause to be opened for settlement in like manner the following described lands, to-wit:

All of said lands under said canal lying to the east of the west boundary of township ten (10) and eleven (11) south of range seventeen (17) east of Boise Meridian as shown on the map Exhibit A.

And when said canal on the southerly side of Snake River shall have been completed to a point thirty (30) miles, measured along the canal from the head thereof, then the remaining portion or parcels of said land shall be thrown open for settlement in the manner provided by law.

Application for Lands.

Sixth: The said party of the first part, through its State Board of Land Commissioners, agrees that it will not approve any application for or filing on said lands until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the said party of the

second part for the purchase of sufficient shares or water rights in said irrigation works, or shares of stock in the corporation owning, controlling and managing the same for the irrigation of the lands applied for. The second party stipulates and agrees that to the extent of the capacity of the irrigation works, and as rapidly as lands are opened for entry and settlement, it will sell, or contract to sell, water rights or shares for lands to be filed upon to qualified entrymen or purchasers, without preference or partiality other than that based upon priority of application.

Sale of Land by the State.

Seventh: That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or will be, by law entitled to file upon the same, for the sum of Fifty (50) Cents per acre, one-half of which shall be paid at the time of application for the entry of such land made to said Board and the remaining one-half at the time of making final proof on the land, as required by law.

Price of Water Rights.

Eighth: Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described or to the owner of other lands not described herein, but susceptible of irrigation from its said canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water

right or share in the said canal for each and every acre owned, filed upon or purchased from the State.

Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-eightieth of one second foot per acre, and each share or water right sold or contracted as herein provided shall also represent a proportionate interest in the said canal, together with all rights and franchises based upon the number of shares finally sold in the said canals.

Such water rights or shares shall be sold to the person or persons aforesaid as follows: To the person or persons filing upon any of the lands herein described at a price not exceeding \$25.00 per share, the same to be paid for as follows: One-fifth in cash at the time of sale and the remainder in five annual installments bearing interest at the rate of six per cent per annum; to the person or persons purchasing any portion of sections numbered sixteen or thirty-six, or any other lands belonging to the State of Idaho which are susceptible of irrigation and reclamation from this canal and to which such water rights are to be applied and dedicated at a price not exceeding fifteen and 50-100 (\$15.50) dollars per share, provided said water rights are purchased within one year after date of sale or contract by the State of Idaho, and not exceeding Twenty-five (\$25.00) dollars at any time thereafter; and to the person or persons owning other lands not herein described but susceptible of irrigation and reclamation from this canal, and to which said water rights or shares

are to be applied or dedicated at a price not exceeding Twenty-five (\$25.00) dollars per share, payment in either case to be made therefor in installments upon interest as hereinbefore provided in the case of other lands.

This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers on terms more favorable than those hereinbefore provided, or to prevent payment of installments or purchase price in advance of the maturity of the same at the option of the purchaser.

But in no case will water rights or shares be dedicated to any of the lands aforementioned or sold beyond the carrying capacity of the canal system, nor in excess of the appropriation of the waters as hereinbefore mentioned.

It is expressly agreed that prior to the time when the said water rights or shares shall have been converted into or replaced by shares of stock of the Twin Falls Canal Company, Limited, a corporation to be formed as hereinafter provided, said water rights or shares in this section referred to shall be understood to represent only a right to the use and enjoyment of the water flowing through or supplied by the canal system, and shall not in any case be held or understood to transfer to or vest in the purchaser thereof a right of ownership in the dam or rights of way, canals, headgates, weirs or other irrigation works, or the right to interfere or participate in the control or management thereof as against the said second party.

It is further stipulated and agreed that any and all contracts upon which water rights or shares in the canal are sold, may by express agreement, provide that upon full payment of the purchase price there shall be given at the option of the second party hereto either a warranty deed for an undivided interest in the canal system or shares in the Twin Falls Canal Company, Limited, hereafter described, one share of stock for one share of water right.

Whereas, it is determined to be necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of shares or water rights in said canals, and of determining their rights among themselves and between said purchasers and the party of the second part herein, and for the purpose of levying and collecting reasonable tolls, charges and assessments for the care and maintenance of said canals, it is further hereby provided that at any time after the completion of the entire system of dam and canals as hereinbefore provided in the specifications and within seven (7) years from the date of this contract, or at any time prior thereto, upon the consent of the State Board of Land Commissioners, a corporation shall be formed under the laws of the State of Idaho, to be known and called the Twin Falls Canal Company, Limited, having the powers and limitations and with the mutual covenants and agreements substantially as set forth in the draft of the Articles of Incorporation hereunto attached marked Exhibit B. "But said Articles of

Incorporation must conform to the provisions of this contract, and must be approved by the State Board of Land Commissioners before said corporation can be formed." The said corporation shall be formed by said second party at its expense, all the stock thereof being subscribed by the second party and such other persons, not exceeding six, as may be necessary and all the stock being subscribed by or for said second party. And immediately upon the formation of said corporation said second party shall by good and sufficient deed convey to it the dam and entire system of canals, and the dam and irrigation works and the water rights connected therewith, free of all debt, lien or encumbrance. And upon the formation of said corporation, the shares or water rights theretofore sold or contracted to be sold shall be converted into or replaced by the shares of said corporation, share for share, and from and after the date of the formation of said corporation the party of the second part shall sell to purchasers or owners of lands under the canal system shares of stock of said corporation upon the same terms in all respects as hereinbefore provided for the sale of water rights or shares prior to the formation of such corporation. The said second party agrees that until it shall have assigned and transferred to settlers and owners of lands under said canal a majority of the stock of the Twin Falls Canal Company, Limited, and thereafter so long as it shall manage and control the said canal system there shall be delivered through the canals and laterals the water flowing therein equally

and proportionately according to the representative rights of the parties entitled thereto.

Any and all deferred payments for the purchase price of water rights or shares of stock may be secured by express contract of the purchaser pledging the water right or stock sold together with any and all rights in the lands to which the water is to be applied and the lien thereby granted shall be in addition to all liens granted by the laws of Idaho.

Water Right Dedicated.

Ninth: The certificates of sale of water rights and the certificates of shares of stock of the Twin Falls Canal Company, Limited, shall each upon being issued to the purchaser or holder of land under the canal system, be made to indicate and define in the contract or certificate, as the case may be, the amount of water, to-wit: One-eightieth of a second foot allotted to each acre represented thereby, and carrying capacity of the canal sufficient therefor, the water to be delivered from the canal during each and every irrigation season, said amount to be measured at or within one-half mile of the place of intended use in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part and used by it during the

period while it retains the management of said system, and that it shall meet the approval of the State Engineer.

The sale or contract of the water right to the purchaser shall be a dedication of the water to the land to which the same is to be applied, and the water right so dedicated shall be a part of and shall relate to the water right belonging to the said system of canals.

All deeds for water rights, if any be issued by the said second party, shall be based upon this contract, and shall meet the approval of the said party of the first part, the State of Idaho.

Measurement of Water Charges for Delivery.

Tenth: The said party of the second part agrees to construct and until it shall convey and turn over the title and possession to the Twin Falls Canal Company, Limited, to operate said canal and main laterals so that water conducted through the same may be delivered at a point not exceeding one-half mile from any legal subdivision of one hundred and sixty acres of land herein described, filed upon, owned or occupied as aforesaid and to be irrigated or reclaimed by the water conducted through said canals and main laterals. That it will construct and place in position and while it retains possession, maintain all headgates, flumes, weirs and other devices through which water may be turned off from said canal or main laterals; that the said party of the second part will construct and place in said canal or laterals such devices for measuring water to irriga-

tors as shall be deemed necessary and best by the State Engineer of Idaho.

It is hereby agreed that every purchaser of shares in said canal or holder of stock in said Twin Falls Canal Company, Limited, shall be entitled to have delivered for the irrigation of his land, its full amount of water as herein provided, and it is hereby stipulated and agreed that while it retains possession and control of said canal system the party of the second part may make a charge for the delivery of said water for irrigation to the purchaser of said shares on the following basis and in the following manner: All of the water dedicated to his land shall be delivered free of charges during the first irrigating season that water is delivered to said purchaser, and thereafter an annual charge not to exceed 80 cents per acre may be made for each and every acre irrigated, or at the option of the purchaser, a charge not to exceed 20 cents per acre foot may be made for each and every acre foot delivered by the second party at the request of such purchaser.

Increase of Capacity of Canal.

Eleventh: The party of the second part shall be entitled at any time within five years from the date hereof to increase the appropriation of water from Snake River at the said dam hereinbefore described, to increase the capacity of said canals or either of them or any lateral thereof, and to use the same so enlarged or increased for the purpose of carrying any water belonging to the said party of the second part under such additional appropriation, provided,

however, that such use shall be allowed only upon the making of such reasonable arrangements as to the expense of and care and maintenance of the canals and irrigation system, as may be agreed upon between the said party of the second part and the said Twin Falls Canal Company, Limited, whenever said last named company shall take possession of the canal system and as shall be approved by said party of the first part.

Any rights acquired by the party of the second part under the provisions of this section shall be at all times held, used and enjoyed subject and subordinate to the rights of the purchasers of water rights for the irrigation of lands are provided in this contract.

It is further agreed that the said party of the second part, for the purpose of raising funds to construct the said canal system, may execute a mortgage or deed of trust upon all its rights which it has or may hereafter acquire by virtue of this contract to any third party, provided that such mortgage or deed of trust shall contain a clause requiring the trustee or mortgagee, as the case may be, upon the payment to such mortgagee or trustee of the amount stipulated to be paid by any payments upon water rights are to be made to the trustee or mortgagee, if any, but trustee or mortgagee may consent otherwise.

Transfer of the Management and Control of Said Canal System to Purchasers of Shares.

Twelfth: Said party of the second part covenants

and agrees that until such time as the majority of the shares of the Twin Falls Canal Company, Limited, shall have been conveyed and transferred to the owners and holders of the land under said canal system, it will cause to be maintained, operated and kept in good repair the said canals and irrigation system, and that if at any time during said period, the proper revenue, tolls, and income of the said Twin Falls Canal Company, Limited, shall be insufficient for the purpose of maintaining, operating and keeping in repair, the said canals and irrigation system, and that if at any time during said period, the proper revenue, tolls, and income to the said Twin Falls Canal Company, Limited, shall be sufficient for the purpose of maintaining, operating and keeping in repair all the irrigation works hereinbefore referred to, it will, at its own expense, and without cost or charge to the said Twin Falls Canal Company, Limited, supply to the treasury of the said last named corporation the funds necessary to supply such deficiency.

Completion of the Canal System.

Thirteenth: Said party of the second part agrees to begin work on said dam and canals and irrigation system within six months from the date of this contract, and that at least one-tenth of the purchasers of water rights to thereupon give a full release to such purchaser for the amount of the water rights so purchased by him; such mortgage or deed of trust to be subject to the terms and conditions of this contract and receive the approval of the Attorney Gen-

eral of the State of Idaho. All construction work shall be completed within two years from the date hereof, that the construction of said works shall be prosecuted diligently and continuously to completion, and that a cessation of work after the second year without the sanction of said Board will forfeit to the State all rights under this contract, and second party further agrees to have said canal system fully constructed and in operation in accordance with this contract on or before five years from the date of this contract. It is understood and agreed that upon completion of the dam hereinbefore provided, and upon the completion of any such portion or portions of the said canal and laterals as may be conveniently operated by said Twin Falls Canal Company, Limited, said party of the second part will, upon the completion of said portion or portions of the canal or canals or laterals and in advance of the completion of the entire canal system, turn over and deliver possession of such completed portion to the said Twin Falls Canal Company, Limited, provided said last named company shall with the consent of the State Board of Land Commissioners be organized prior to the completion of the canal, to the end that as rapidly as may be, the operation, maintenance and control of the said canal and irrigation system may be placed under the control and in the possession of said last named company.

Forfeiture.

Fourteenth: The said party of the second part agrees that upon the failure on its part to begin the

construction of the said canal within the time specified in this contract, or upon the failure to proceed with the work, as agreed upon in this contract, after receiving sixty days' notice from the Secretary of the State Board of Land Commissioners, the bond given to secure the strict performance of the agreement herein contained, together with any portion or portions of said canal that may have been constructed under the conditions of the contract, shall be at once forfeited to the said party of the first part, the State of Idaho, and that the said party of the first part, acting through its said Board of Land Commissioners, may declare the same forfeited and proceed to enforce said bond and to take possession of said canal and irrigation works, and all the rights the said party may have acquired therein, as provided in the Act of the Legislature of the State of Idaho first referred to in this contract.

Estimated Cost.

Fifteenth: The estimated cost of the proposed irrigation works is One Million Five Hundred Thousand (\$1,500,000.00) Dollars. It is understood and agreed that the existing law under which this contract is executed is as much a part of this contract as if specifically herein set forth.

Description of Lands.

Sixteenth: The lands hereinbefore referred to being the lands donated by Act of Congress to the State of Idaho under and pursuant to the Act approved August 18th, 1894, commonly called the "Carey Act," the reclamation and irrigation of

which lands this contract is especially designed to effect, are duly set forth and described in a list hereunto attached and made part of this contract marked Exhibit C.

In witness whereof, the said party of the first part, the State of Idaho, has by resolution of its State Board of Land Commissioners caused this agreement to be signed in duplicate by its Governor, attested by its Secretary of State, and the Great Seal of said State to be affixed hereto, and the said party of the second part has hereunto caused its corporated name to be attached by its President and attested by its Secretary, and its corporate name to be attached by its President and attested by its Secretary, and its corporate seal to be affixed, as well as on the duplicate hereof, the day and year first above written.

For the State of Idaho,

(Seal) By F. W. HUNT, Governor.

Attest: CHAS. J. BASSETT,
Secretary of State.

THE TWIN FALLS LAND AND WATER
COMPANY,

(Seal) By S. B. MILNER, President.

Attest: HARRISON E. JENKINS,
Secretary.

Boise, Idaho, March 29, 1911.

County of Ada,
State of Idaho,—ss.

I, N. Jenness, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the foregoing and hereto attached instru-

ment is a true and correct copy of the contract between the State of Idaho and the Twin Falls Land and Water Company, as same appears of record and on file in my office.

In witness whereof, I have hereunto set my hand and official seal this 29th day of March, 1911.

N. JENNESS, Register.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

EXHIBIT "E."

AGREEMENT BETWEEN THE STATE OF
IDAHO AND TWIN FALLS NORTH SIDE
LAND AND WATER COMPANY.

THIS AGREEMENT, Made and entered into, in duplicate, this 15th day of April, 1907, by and between the STATE OF IDAHO, the party of the first part, through the State Board of Land Commissioners of said State, said Board consisting of Frank N. Gooding, Governor, Robert Lansdon, Secretary of State, John J. Guheen, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said State, and the TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a corporation organized and existing under the laws of the State of Delaware and duly authorized to do business in the State of Idaho, the party of the second part, WITNESSETH:

THAT WHEREAS The party of the second part had succeeded to all the rights in the Twin Falls Land and Water Company (a Utah Corporation), for the

irrigation of lands in Lincoln County, State of Idaho, which rights are evidenced by that certain contract between the State of Idaho and the Twin Falls Land and Water Company, dated January 2, 1903, and by the proposal and request of said Twin Falls Land and Water Company, filed on the 24th day of December, 1906, with this Board, which said proposal and request were approved by this Board on the 27th day of December, 1906, all of which may be more specifically described as the right to the irrigation of thirty thousand (30,000) acres of land, hereinafter known as the First Segregation, on the north side of Snake River in Lincoln County, Idaho, which lands are described in the contract, heretofore mentioned, of the 2nd day of January, 1903, and also the right to the irrigation of one hundred and fifty-five thousand two hundred eighty-one and forty-three hundredths (155,281.43) acres of land situated in said Lincoln County under the line of the canal of the Twin Falls Land and Water Company as extended from First Segregation, which said last mentioned lands are hereinafter known as the Second Segregation, being List No. 13 of the State of Idaho filed in the United States Land Office at Hailey, Idaho.

AND WHEREAS All of the property, rights, and franchises of said Twin Falls Land and Water Company, in Lincoln County, State of Idaho, together with a proportionate interest in the dam of said Company at Milner, Idaho, have by the consent of the said Board of Land Commissioners been duly transferred to the party of the second part herein.

AND WHEREAS the lands lying under said proposed irrigation works and included in the premises known as the First Segregation and the State of Idaho, dated July 1, 1901, set apart by the United States in compliance with the provisions of an Act of Congress, commonly known as the Carey Act, said lands being a portion of the lands described in the list numbered six (6) of the State of Idaho filed in the United States Land Office, at Hailey, Idaho, all of which are situated in Lincoln County, Idaho, a detailed list of which lands are hereto attached, made a part hereof and marked "Exhibit A."

AND WHEREAS, the first and second parties hereto deem it advisable to begin the work of reclaiming said lands without awaiting the approval of the remainder of the segregation, and agree to enter into a formal contract for said purpose, the same to become a part of the contract to be entered into for the reclamation of the remainder of said lands applied for.

IT IS MUTUALLY COVENANTED AND AGREED as follows:

Purposes of the Contract.

1. That for and in consideration of the covenants of said party of the first part herein contained the party of the second part agrees to construct and build said canal and irrigation system, beginning at the point of diversion at the Milner Dam, on the north side of Snake River, in said Lincoln County, at the point hereinafter described, and designated on the map of said canals marked "Exhibit A," and

filed with the proposal and request herein on the 24th day of December, 1906, and which map is hereby referred to and made a part of this contract; and including also a distributing system from said canal; and to sell shares or water rights in said canal system from time to time, as hereinafter provided, to the persons filing upon the lands hereinafter described, and also to the owners of other lands not described herein but which are susceptible of irrigation from this canal system, said shares or water rights to be sold on the terms hereinafter provided, and to transfer the ownership, management and control of said canal system to the said purchasers of shares or water rights as hereinafter provided.

General Specifications for Construction of Twin Falls North Side Canal.

(First Segregation.)

2. It is hereby agreed that the party of the second part shall construct, beginning at the north end of Milner Dam, in Lincoln County, three (3) more gates of the same design as the two gates which are at present constructed at this place, plans of which are hereby submitted; these gates to control the water from Snake River into the Canal and to be the diversion for the irrigation project herewith contracted for.

The proposed diversion is designated as Sta. 0-00 at a point on line between Sections 28 and 29 Twp. 10 S. R. 21 E., from which the corner to Sections 20, 21, 28 and 29 bears north 2364.8 ft. distant. From this

point the canal extends in a westerly direction and is more fully described in the field notes on file in the State Engineer's Office at Boise and in the United States Land Office at Hailey.

General Description of Canal.

The canal covering the First and Second Segregations is approximately 340,000 feet long, extending from the Milner Dam on Snake River, near the town of Milner, approximately to the Malade River, through Twp. S. R. 20 and 21 E., Twp. 9 S. Rgs. 19 and 20 E., Twp. 8 S., Rgs. 17, 18 and 19 E., Twp. 7 S., Rgs. 15, 16, 17 and 18 E. and Twp. 6 S., Rgs. 14 and 15 E. The Canal to carry 1800 second feet of water for a distance of four miles to station 206. (These stations are 100 feet long). This is four miles from the Milner Dam extending to a draw which empties into Wilson Lake Reservoir.

The canal is to be built of earth, rock and concrete, with $7\frac{1}{2}$ feet depth of water.

Where canal is in earth section it is to have banks with slopes of 2 to 1 on the inside and $1\frac{1}{2}$ to 1 on the outside. The top to have a width of 8 feet. The canal in earth to have a grade of 0.03 feet for 100 feet. A general width of 55 ft. on the bottom. The slopes in earth cuts to be 2 to 1 below high water line and 1 to 1 above high water line.

Rock sections to have a slope to $\frac{1}{4}$ to 1, the width of the bottom to be 40 feet and a grade of 0.01 feet to the 100 feet.

At the end of the fourth mile laterals of the fol-

lowing dimensions; as shown on plat filed in the office of the State Engineer and with the same Board of Land Commissioners.

LATERAL NO. 1.

17,300 feet canal.

Base 16 feet; slope 2 to 1.

4.5 feet water depth.

6.0 feet to top of bank.

315 cu. ft. per sec. carrying capacity.

Crown of bank 3 feet.

19,500 feet canal.

Base 15 feet; slope 2 to 1.

4.5 feet depth of water.

6.0 feet to top of bank.

285 cu. feet per sec. carrying capacity.

Crown of bank 3 feet.

13,400 feet canal.

Base 14 feet; slope 2 to 1.

4.3 feet depth of water.

5.8 to top of bank.

Crown of bank 3 feet.

250 cu. ft. per sec. carrying capacity.

23,200 feet of canal.

Base 13 feet; slope 2 to 1.

4.0 feet depth of water.

5.5 feet to top of bank.

Crown of bank 3 feet.

225 cu. feet per sec. carrying capacity.

16,700 feet canal.

Base 10 feet; slope 2 to 1.

5.5 feet to top of bank.

Crown of bank 3 feet.

165 cu. feet per sec. carrying capacity.

4.0 feet depth of water.

9,000 feet of canal.

Base 10 feet; slope 2 to 1.

2.8 feet depth of water.

3.8 feet to top of bank.

80 cu. feet per sec. carrying capacity.

8,000 feet of canal.

Base 10 feet; slope 2 to 1.

2.5 feet depth of water.

3.5 feet to top of bank.

Crown of bank 3 feet.

65 cu. feet per sec. carrying capacity.

LATERAL NO. 2.

15,000 feet canal.

Base 10 feet; slope 2 to 1.

1.9 feet depth of water.

2.9 feet to top of bank.

Crown of bank 3 feet.

35 cu. ft. per sec. carrying capacity.

LATERAL NO. 3.

13,600 feet canal.

Base 4 feet; slope 2 to 1.

2.0 feet depth of water.

3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. ft. per sec. carrying capacity.

LATERAL NO. 4.

7,000 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. feet per sec. carrying capacity.

LATERAL NO. 5.

24,000 feet canal.
Base 10 feet; slope 2 to 1.
1.9 feet depth of water.
2.9 feet to top of bank.
Crown of bank 3 feet.
35 cu. feet per sec. carrying capacity.

35,000 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.
Crown of bank 3 feet.
25 cu. feet per sec. carrying capacity.

LATERAL NO. 6.

37,400 feet canal.
Base 4 feet; slope 2 to 1.
2.0 feet depth of water.
3.0 feet to top of bank.

Crown of bank 3 feet.

25 cu. feet per sec. carrying capacity.

SUB LATERALS.

14 miles.

Base 4 feet; slope 2 to 1.

1 foot cut. Earth put into banks.

On all laterals cut to make banks.

The laterals are to be built to cover Carey lands in parts of Twp. 10 S. Rgs. 18, 19, 20, 21 East and Twp. 9 S., Rgs. 18, 19, 20 and 21 E., taken under the segregation of the South Side Canal, lying north of Snake River.

At the end of the fourth mile the remainder of the water will be turned into a natural channel through drop and waste gates and will run for a distance of about five miles and accumulate in Wilson's Lake Reservoir, which will be formed by three dams, to be built of puddled earth and rock.

(Second Segregation.)

This lake will be converted into a storage reservoir to conserve 60,000 acre feet of water by raising the water surface of the Lake 50 feet to the height of 4010 feet. This will require one dam of puddled earth 50 feet high at the highest point and 1200 feet long. Another dam 32 feet high in the deepest place and 5500 feet long. Another dam two miles long of an average height of ten feet. These dams to have an inside slope of 3 to 1 and outside slope of 2 to 1; the canal to have an outlet in solid rock with head gates to let the water into the canal below Wilson's

Lake at an elevation of 3960 feet. At this point, which is on the East side of Section 24, Twp. 8 S. R. 19 E., the water is to be taken out of Wilson's Lake Reservoir from the bottom of tunnel and gates and canal, which will have a capacity of 1500 second feet, the canal to extend in a northeasterly direction to the Northeast quarter of Section 8 Twp. 8 S. R. 18 E. and to be emptied into what is known as Sugar Loaf Reservoir.

This reservoir is designed to hold 20,000 acre feet of water, to be used as a storage reservoir. The reservoir to be formed by building two dams of earth and rock with a 3 to 1 slope on the inside of the dam and a 2 to 1 slope on the outside of the dam with an 8 foot width on top. The heavy parts of this earth dam will be puddled. The size of the dam is to be about $2\frac{1}{2}$ miles in length, of which $1\frac{1}{2}$ miles is to average five feet in height and $\frac{3}{4}$ of a mile to have an average height of 18 feet. The second dam is to be about $1\frac{1}{2}$ miles long with an average height of 7 feet. At the end of the last described canal in Sec. 8, Twp. 8 S. T. 18 E., a canal will be constructed running around Sugar Loaf Butte, which will have a carrying capacity of 820 second feet of water. About two miles out from the head of this canal a division will be made and two canals, one continuing East and South with 480 second feet capacity, and the other West and South with 340 second feet capacity around Sugar Loaf Butte to a point in Sec. 20 Twp. 8 S. R. 17 E. From these canals the main coulees will be used to cover the land. From these coulees other

small laterals will be constructed to cover from the first canal, running East of Sugar Loaf Butte, about 60 sections of land, described as follows:

All the Carey Act lands in Twp. 8 S. R. 18 E. Twp. 9 S. R. 18 E. Also fractional Twps. 9 S. Rgs. 15, 16 and 17 E. and South portions of Twps. 8 S. R. 16 and 17 E. The canal running around the West side of Sugar Loaf Butte to cover about 37 sections, as follows:

The North part of Twp. 8 S. R. 17 E. and part of Sections 1, 2, 9, 10, 17 18, 25 and all of Sections 11, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 and 24 of Twp. 8 S. R. 16 E. Parts of Sections 24, 26, 27, 31, 35, 36 and all of Sections 25, 32, 33, 34 of Twp. 8 S. R. 15 E. Parts of Sections 33, 34, 35, 36 of Twp. 8 S. R. 14 E. From Sugar Loaf Reservoir an opening will be made with gates into the main canal again, continuing through Sections 36, 35, 34 and 27 with a canal which will have a capacity of 780 second feet to Section 27 Twp. 7 S. R. 17 E. To cover the balance of the land and in Section 27 the canal to be reduced, part of the water to be emptied into a natural course to cover 67 sections of lands as follows:

Part of Sections 27, 28, 31, 32, 33, 34, Twp. 7 S. R. 17 E. Part of Sections 1, 2, 3, 4, 5, 6, 9, 11, Twp. 8 S. R. 16 E. All of 7 and 8 of Twp. 8 S. R. 16 E. Part of 32, 33, 36 Twp. 7 S. R. 16 E. Part of Sections 1, 2, 3, 4, 24, 26, 27, 28, and all of 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 29 and 30, Twp. 8 S. R. 15 E. Part of Sections 29, 30, 33, and all of 31, 32, of Twp. 7 S. R. 15 E. All

of Sections 5, 6, 7, 8, 17, 18, 19, 20, 21, 26, 27, 28, 29, 30, 32, 33, 34, 35 and 36. Part of Sections 9, 16, 22, 23, 24 and 25, Twp. 7 S. R. 14 E. Part of 1 and 12 Twp. 7 S. R. 13 E. All of 1 to 17, inclusive, 21 to 27 inclusive and part of 28, 34, 35, 36, Twp. 8 S. R. 14 E. The balance of the segregation, about 14,000 acres, to be covered from a small lateral leading off the main canal at Section 27. Twp. 7 S. R. 17 E., to cover Carey Act lands in Twp. 7 S. R. 14, 15, 16, 17 and 18, Twp. 6 S. Rgs. 13 and 14 E. of the Boise Meridian.

This Canal System to be surveyed and laterals to be determined by topographical survey which is to be made and platted so that a contour of the ground can be definitely shown. The size of laterals to be determined from the lay of the ground, the amount of the land governing the size of the laterals for each district by projecting lines on this plat and laying them out on the ground in conformity with the plat. This Plat and System of Laterals to be submitted to the State Engineer for approval from time to time as the surveys are made. Coulees and draws are to be utilized as water ways when convenient. Openings in the main canal are to be of concrete. Changes in these plans and specifications may be made with the consent of the State Engineer.

Right of Way.

3. The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho, or that may

be ceded to the State by virtue of the Act of Congress commonly known as the Carey Act, or by any other laws for the construction and operation of said canals, reservoirs and the distributing system therefrom and the necessary waste ditches, which right of way shall be equal to the actual width of the canal, lateral or waste ditch at its base, from toe to toe of the embankment, together with a strip of land along one side of such canal, lateral or waste ditch, and adjacent thereto, not to exceed 50 feet in width along the Main canal, 30 feet in width along the laterals leading from said Main Canal, and a proportionate width along the smaller laterals and waste ditches; said right of way to be located as designated by the Chief Engineer of the party of the second part, and approved by the State Engineer, and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch, in proportion as the necessity therefor exists, and all water users on lands irrigated from said canals or laterals shall have such right of way as may be necessary from the second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use, and such right of way across said lands as may be necessary for waste ditches. No reservoirs, however, shall be constructed under this provision of this contract upon any portion of Sections Sixteen (16) or thirty-six (36), without making compensation and complying with the laws of the State governing that subject. No more laterals, service or waste ditches shall be constructed across any premises than are necessary, in

the opinion of the Chief Engineer of the company and the State Engineer to properly irrigate the land so intended to be irrigated from such ditches and to carry away the waste water therefrom.

The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the Company, and subject to his approval and the approval of the State Engineer. In case any land owner is dissatisfied with the location of any service ditch across his premises he shall have the right to appeal to the State Board of Land Commissioners, whose decisions shall be final. Detail maps showing the location of reservoirs, laterals and waste ditches constructed by the second party shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement.

Appropriation of Water.

4. WHEREAS the Twin Falls Land and Water Company, the predecessor in interest of the second party herein, did on the 11th day of October, 1900, duly appropriate four hundred (400) cubic feet per second of the waters of Snake River to be taken from said river in the north side thereof at what is now known as the Milner Dam, and whereas the said predecessor of second party procured Permit No. 1603 to be issued by the State Engineer of Idaho and approved October 14, 1905, said permit being for the diversion of 2250 cubic feet per second of the waters of Snake River to be taken from Snake River on the north side thereof at the same Milner Dam,

and whereas second party has acquired the water appropriation of I. B. Perrine dated June 25th, 1900, said appropriation being recorded in Book One of water rights at page 229 of the records of Lincoln County, Idaho, which said appropriation is for 3,000 cubic feet per second of the waters of Snake River to be taken from said river at the point where the Milner Dam is now located.

NOW THEREFORE, The said party of the second part agrees to furnish and deliver to said canal and to the owners of shares therein, as specified in the other provisions of this contract, all of said appropriated waters to which said second party may be entitled, to the extent of one-eightieth (1-80) of one (1) cubic foot per second of time per acre, said waters to be furnished for the reclamation of the lands hereinafter described together with any other lands not described herein which are so situated as to be susceptible of irrigation and reclamation from said canal system.

And the said second party hereby covenants and agrees that it has not done, suffered or permitted on its part any act or thing by reason whereof the appropriation so made of the said waters of Snake River for the purpose of the irrigation and reclamation of lands through the system of works to be constructed hereunder, has been or in future may be in any way impeached, clouded or impaired.

Entry of Lands.

5. Upon the execution of this contract and when the actual construction of said canal have been in-

augurated, the party of the first part will, by notice given in conformity of law, throw open the hereinafter described lands for settlement under such regulations as to the manner of said opening as shall be prescribed by the State Board of Land Commissioners.

(Notice has already been given of opening of First Segregation).

Application for Lands.

6. The said party of the first part, through its State Board of Land Commissioners, agrees that it will not approve any application for or filing on the lands hereinafter described until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares of water rights in said irrigation works for the irrigation of said lands, said shares or water rights to be evidenced by the stock of the North Side Canal Company, Limited, as hereinafter provided.

The second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of its water rights, as rapidly as lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality, other than that based upon priority of application, it being understood however that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal as against subse-

quent purchasers, but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of the application upon the opening days shall be determined by a system of drawing under the direction of the State Board of Land Commissioners.

Sale of Land by the State.

7. That the said party of the first part, acting through its State Board of Land Commissioners, agrees to sell the lands herein described to such persons as are or may be by law entitled to file upon the same, for the sum of fifty cents (\$0.50) per acre, half of which sum shall be paid at the time of application for the entry of such land made to said Board, and the remaining one-half at the time of making final proof thereon.

Price of Water Rights.

8. Said party of the second part further agrees and undertakes that it will sell or cause to be sold to the person or persons filing upon any of the lands herein described, or to the owner of other lands not described herein but which are or may be susceptible of irrigation from its canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said canal for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying

capacity in said canal sufficient to deliver water at the rate of one-eightieth (1-80) of one (1) second foot per acre, and each share of water right sold or contracted, as herein provided, shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal. Said canal, however, to be built in accordance with the plans heretofore filed with the Board, which canal, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned. Such water rights or shares shall be sold to the person or persons aforesaid for lands under or adjacent to the First Segregation or included therein as follows:

To the person or persons filing upon any of said lands at a price not exceeding thirty dollars (\$30) per share, except as hereinafter provided, the same to be paid for as follows:

One-fifth (1-5) in cash at the time of the sale, and the remainder in five equal annual installments, bearing interest at the rate of six per cent. (6%) per annum, payable annually; to the person or persons purchasing any portions of sections numbered Sixteen (16) or thirty-six (36), or any other lands belonging to the State of Idaho and within the exterior limits of said First Segregation, and which are susceptible of irrigation and reclamation from this canal, at a price not to exceed \$20 per share. PROVIDED said water rights are purchased within one year after the purchase of the lands from the

State, and not exceeding \$30 at any time thereafter. Said payments upon said State lands to be made one-seventh (1-7) at the time of purchase and the remainder in six (6) equal annual installments, with interest thereon, at the rate of six per cent. (6%) per annum payable annually. In case purchasers or entrymen on lands other than those segregated under the Carey Act, decline to purchase water rights for two years or more after the water is ready for delivery, then One Dollar and Eighty Cents (\$1.80) may be added to the price of the water rights for each year's delay, or fraction thereof. For lands adjacent to and within one mile of the proposed line of railway through said Segregation said second party shall be entitled to receive the price for water rights marked upon the plat of said railway line, filed with the Register of the State Board of Land Commissioners and marked "Exhibit B," the prices thereon ranging from Thirty-eight Dollars (\$38.00) to Thirty-two Dollars (\$32.00) per share for water rights, said rights to be paid for, as follows:

It is agreed that Thirty Dollars (\$30.00) of said price shall be charged as on all other Carey Act lands and that the additional amount shall be added to the last three payments to be made by the purchaser as follows:

On water rights costing Thirty-eight Dollars (\$38.00) per acre, the first of said three payments shall be Two Dollars (\$2.00) additional and the second and third payments Three Dollars (\$3.00) each additional. On water rights costing Thirty-six Dol-

lars (\$36.00) the said additional payments shall be Two Dollars (\$2.00) per annum for each of said three years. On water rights costing Thirty-four Dollars (\$34.00) the first and second additional payments shall be One Dollar (\$1.00) each and the third payment Two Dollars (\$2.00). On water rights costing Thirty-two Dollars (\$32.00) the first and second payments shall be Fifty Cents (\$0.50) and the third payment One Dollar (\$1.00).

Said additional sums above the price of Thirty Dollars (\$30.00) shall not, however, be paid or become due unless the building of said railroad is commenced within eighteen (18) months from this date and completed within five years to a point at least twenty miles distant from the town of Milner, in a westerly direction. No interest is to be charged on such additional amount until the road is built to a point within one mile of the premises to be charged. The total maximum amounts above mentioned are the liens hereby authorized against the legal subdivisions of land to be sold to entrymen.

This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers on terms more favorable than those herein provided, or prevent the payment of installments on purchase price in advance of maturity of the same at the option of the purchaser. But in no case shall water rights or shares be dedicated to any lands aforementioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor.

Transfer of Possession and Management of Canal.

9. It being necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein, for the purpose of operating and maintaining said canal during the period of construction and afterwards for the purpose of levying and collecting tolls, charges and assessments for the carrying on and maintenance of said canal and the management and operation thereof, it is hereby provided that as soon as said lands are ordered thrown open for settlement, a corporation, to be known as the North Side Canal Company, Limited, shall be formed at the expense of the party of the second part, the Articles of Incorporation of said Company to be in the form which is herein attached and made a part hereof; that the authorized capital stock of said corporation shall be Two Hundred Thousand (200,000) shares, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock representing the same. Said shares of stock, however, shall have no voting power and shall not have force

and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.

At the time of the purchase of any water right there shall be issued to the purchaser thereof one share of the capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights or shares of stock are not fully paid for, require the endorsement and delivery to it of said stock, and shall at the same time, require of said purchaser an agreement that until thirty-five per cent (35%) of the purchase price of said stock has been paid the said party of the second part herein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation.

But the said second party hereto nor the North Side Canal Company cannot in any manner control any of the said system so as to limit the liability of the said second party under the terms of this contract.

The said North Side Canal Company shall have the management, ownership and control, as above set out, of the said canal system as fast as same is completed and turned over to it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the Company and the State Engineer that certain portions of the said canal are completed for the purposes of operation, the same may, with the consent of the Land Board be turned over to the North Side Canal

Company for operation. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of this contract, nor shall such consent upon the part of the State Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of said canal must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire canal system.

10. The certificates of shares of stock of the North Side Canal Company, Limited, shall be made to indicate and define interest thereby represented in the said system, to-wit: A water right of one-eightieth (1-80) of a cubic foot per second for each acre and a proportionate interest in said canal, and shares based upon the number of shares ultimately sold therein. While the party of the second part shall retain control of said North Side Canal Company, Limited, water shall be measured to users at the place of diversion from the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation, as will best protect and serve the interests of all the users of water from said canal system. It is agreed that said system of distribution by rotation shall be devised by said party of the second part and used by the North Side Canal Company, Limited,

(in case the necessity arises) during the period while it retains the management of said North Side Canal Company, Limited, said system of rotation, however, to be approved by the State Engineer. The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system.

Management of Water and Charges for Delivery.

11. The party of the second part agrees to construct said canal system so that water conducted through the same may be available at a point not to exceed one-half mile, measured in a direct line, from each quarter section of land herein described and to be irrigated and reclaimed by water conducted through said canals. That it will construct and place in position all headgates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals, it being intended that the settler shall, under the direction of the Chief Engineer of the second party, build and furnish one gate or measuring device for his use, but that all other gates, weirs and measuring devices in the main canals, mains or subordinate laterals shall be furnished and constructed by the second party. Plans for measuring devices, headgates and weirs are to be approved by the State Engineer. No charge shall be made to the purchaser for the delivery of water for lands under the First Segregation, or adjacent thereto, prior to the first day of January, 1909.

For each succeeding year thereafter, while the second party retains the control of the said North Side Canal Company, Limited, said Company may charge and assess the purchasers of water rights in said irrigation system not to exceed the sum of Thirty-five cents (35c) per acre for each acre of land for which a water right has been purchased, said sum to be due and payable on the first day of March of each year. If the sum so raised shall be insufficient for the purpose of maintaining, operating and keeping in repair said system and paying the expenses of the management thereof, then said second party will furnish the additional funds necessary to supply such deficiency.

A main lateral, within the meaning of this contract, is a lateral taken from the main line of the canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral or a subordinate lateral shall also be included within these terms.

Completion of System.

12. Said party of the second part agrees to begin work on said irrigation system within one month from the date of this contract, and that it shall be fully completed, so far as covering the First Segregation of land is concerned, within two years from the date hereof. That the construction of said work shall be prosecuted diligently and continuously to completion and that there must be no cessation of work after the first year for more than sixty (60) days without the consent of the Board.

Second party further agrees to have said canal system, so far as it relates to the First Segregation only constructed and in operation in accordance with the contract within two years from the date hereof, it being understood, however, that detailed plans and specifications of said work have not yet been completed, and that said detailed plans and specifications are to be approved by the State Engineer, and that with his consent and the consent of the State Land Board alterations and changes may be made in the plans prepared and filed.

Maintenance of Dam.

13. Inasmuch as the dam at Milner is to be jointly used by the Twin Falls Canal Company, Limited, and the North Side Canal Company, Limited, and is to be jointly owned by them, it is understood and agreed that said Companies shall jointly provide for the management and control of said dam and gates in the canals and dam and shall jointly appoint the person or persons to have charge thereof, and in case of their inability to agree the State Engineer shall appoint a person to take such charge and control, PROVIDED, however, in case of failure or inability of the State Engineer to act, that the State Board of Land Commissioners shall appoint such person. The expenses of the management, operation, repair and control of said dam and gates will be borne by said Companies ratably in proportion to the acres of land under said canals for which water rights are purchased. Forfeited water rights, however, are not to be included in such computation.

Forfeiture.

14. It is agreed that the rights of second party herein may be forfeited in accordance with the laws of the State of Idaho relative to that subject, which are now in force and effect.

Estimated Cost.

15. The estimated cost of the proposed irrigation works is three million dollars (\$3,000,000) and upwards, and the price at which water rights are fixed herein and for which liens are authorized against the separate legal subdivisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

Description of Lands.

16. The lands hereinbefore referred to are lands donated by the Act of Congress to the State of Idaho under and pursuant to the act approved August 18, 1894, and the amendments relating thereto commonly called the Carey Act, the irrigation and reclamation of which lands this contract is designed to effect. The lands are fully set forth in the list herewith marked "Exhibit A," which is hereby referred to and made a part hereof.

Highways.

17. Entries of land are understood to be made subject to a right of way, without compensation to the entrymen for roads upon all exterior section lines

and also upon all half section lines which may be designated by the Board of County Commissioners as may be provided by law.

Water Supply for Cities and Towns.

18. It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or recital, as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established, or the residents therein. Said cities and towns must contribute to the maintenance and support of said canal system in proportion to the amount of water used by them, and shares of stock of the North Side Canal Company, Limited, shall be issued for the amounts of water represented by said use to the Trustees of any village or the Mayor of any City, in trust for the use and benefit of the towns and cities and the inhabitants thereof.

Delivery of Water to Users.

19. It is agreed that the said North Side Canal Co., Limited, shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights or who are not holders of stock in said North Side Canal Co., Ltd., or who are not otherwise entitled thereto under this contract.

Subsequent Segregations.

20. This contract, in so far as the specifications and plans are concerned, is intended to cover the works necessary for the irrigation of the lands hereinbefore mentioned known as the First Segregation, it being understood that there is now pending an application on the part of the State of Idaho for the Segregation of 155,281.43 acres of land situated in Lincoln County, Idaho, and more particularly described in the List of Lands filed with the Request and Proposal of the Twin Falls Land and Water Co., on the 24th day of December, 1906, which proposal and request were approved by this Board on the 27th day of December, 1906, and also for 3550 acres of land in rejected list No. 14, filed in the Hailey, Idaho Land Office.

It is further understood and agreed that all purchasers of water rights for lands under what is known as the First Segregation obtain a proportionate interest in the entire system of said Twin Falls North Side Land & Water Company, and that this contract is entered into at this time and with reference to the First Segregation, for the reason that the first and second parties hereto do not desire to delay the settlement of portions of said tract which have been segregated for years, and do not wish to await the approval of the segregation of the other portions of said tract; and it is further understood and agreed between the first and second parties hereto that immediately after the approval of the remainder of said

requested segregation they will enter into a specific contract for the reclamation of such segregation, which shall be substantially in the same form as the within contract, the said contract to be considered as a part of the within contract, the two separate instruments to be construed together as one contract covering the entire canal system of the Twin Falls North Side Land & Water Company as shown by the plans, maps and specifications of said system on file in the State Engineer's office.

Mortgage.

The right, title and interest of the second party in the works and irrigation system may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

Amendments.

This contract may be altered and amended by first party with the consent of the second party for the purpose of carrying out the object of the contract, and for the purpose of meeting any conditions now unforeseen.

IN WITNESS WHEREOF, the said party of the first part, the State of Idaho has by resolution of its State Board of Land Commissioners, caused this agreement to be signed in duplicate by its Governor who is ex-officio President of said Board, and attested by the Register of said Board, and the said party of the second part has hereunto caused its corporate name and seal to be affixed by its Assistant

Secretary under due authority from its Board of Directors the day and year first herein written.

FOR THE STATE OF IDAHO.

(Signed) F. N. Gooding, Governor.

Attest: (Signed) M. I. Church, Register.

State Board of Land Commissioners.

TWIN FALLS NORTH SIDE LAND AND
WATER COMPANY,

By (Signed) Jerome Hill, Jr.,

(Seal.)

Asst. Sec.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk.

EXHIBIT "F."

Office of the State Engineer,

Boise, Idaho, August 12, 1907.

To the Honorable State Board of Land Commissioners, State Capitol, Boise.

Gentlemen:—

Pursuant to the provisions of Section Nine of Chapter 11 of House Bill 143 (Sess. Laws, 1899 p. 286) approved on the second day of March, 1899, I have the honor to submit the following report on the proposal of George F. Sprague, C. B. Hurtt, H. L. Hollister and I. B. Perrine, relative to the segregation, reclamation and irrigation of certain lands, now a part of the public domain, said lands hereinafter described, being subject to segregation under the provisions of the Act of Congress approved August 18, 1894, entitled "An Act making appropriations for

sundry civil expenses of government for the fiscal year ending June 30, 1895, and for other purposes," (28 Stat. 372-422), and other acts amendatory thereof.

The Lands, for which segregation is sought in the above mentioned proposal, are arid in character as contemplated in the Acts of Congress above cited and comprise 150,000 acres lying in townships 10 to 14 south inclusive and within ranges 14 and 18 east inclusive, Boise base and meridian. The northern line of the tract is contiguous to the southern line of the Twin Falls tract, the soils of the two being of the same general character as to fertility and certain productiveness under irrigation. The general topography and natural facilities for irrigation are all that could be asked for.

The Water Supply will be taken from the Salmon River, the proposers holding a permit from this office to divert 1500 cubic feet per second of time from that stream, together with all storm and flood waters. The Salmon River above the point of intended diversion has a drainage area of about 1750 square miles, a good portion of which lies in the mountains where very heavy falls of snow occur each year. The waters available for the enterprise are unquestionably adequate for the purpose in hand and the right of the proposers is most excellent, legally considered, all adverse priorities being so small in the aggregate as to be negligible.

The Proposed Works will consist of a reservoir and

diversion dam, tunnel, canals and laterals necessary to deliver water to within one-half mile of each 160 acre tract of the lands to be irrigated. The dam will be located at a point where the Salmon River enters the canyon near the east line of Sec. 18, T. 14 S. R. 15 E. B. M. It is estimated that by means of this dam together with supplementary storage to be developed if necessary, over 400,000 acre feet of water can be impounded annually. The normal flow of the river will prove sufficient for all purposes probably until the middle of July, after which time the reservoir supply will be drawn on.

The Estimated Cost which has been fixed at \$3,000,000.00 is, I believe, fairly correct. This includes the building of the reservoir dam tunnel, and all canals and laterals necessary to deliver water to within one-half mile of each 160 acre subdivision in the tract. A charge of \$35.00 per acre for water rights under this project would, I believe, be justified, owing to the expense to be incurred in transporting materials to the reservoir site which is about 40 miles from the nearest available railroad point. Should the plans of the proposers now under foot for the building of a railroad through the tract be realized, I believe that a charge of \$40.00 per acre for water rights would be reasonable.

In conclusion I would say that, in my opinion, the project in question is one of unusual merit, and will prove a noteworthy success and a goodly increase to the irrigated area of the State, in the event of favor-

able consideration by your Honorable Board and the Honorable the Secretary of the Interior.

Respectfully submitted,

JAMES STEPHENSON, JR.,

State Engineer.

State of Idaho,

County of Ada,—ss.

I, Heber Q. Hale, Register of the State Board of Land Commissioners of the State of Idaho, do hereby certify that the above and foregoing is a true and correct copy of report of State Engineer under date of August 12, 1907, on file in my office, relative to the Twin Falls Salmon River Project.

In witness whereof, I have hereunto set my hand and affixed the official seal of the State Board of Land Commissioners this 28th day of October, 1915.

(Seal.) HEBER Q. HALE, Register.

Endorsed: Filed Oct. 29, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

MEMORANDUM DECISION ON APPLICATION
OF DEFENDANT TO REOPEN CASE.

Nov. 3, 1915.

C. O. Longley and W. E. Golden, Attorneys for Plaintiffs.

Richards & Haga, S. H. Hays and P. B. Carter, Attorneys for Defendant.

Dietrich, District Judge:

The application is to have the case reopened for the introduction of testimony tending to explain the

terms and conditions of the contract which is the basis of the suit, on the theory that it is ambiguous. There is no showing of inadvertence or surprise, nor is it contended that the evidence which it is sought to introduce is newly discovered. The affidavit attached to the application sets forth in somewhat general terms the line of testimony which it is desired to offer, and this more or less directly relates to the issue, but it is doubtful whether, if the facts suggested and none other, were admitted to be true, they could be given effect. There is no showing that such facts were known to the settlers or water users who are parties to the contract in question, and of course facts of which a party is ignorant do not tend to throw any light upon the purpose or intent with which he acted. But entirely aside from this consideration, I do not think it would be proper now to reopen the issue. It would set a precedent for a very dangerous practice. While there was some doubt during the course of the trial as to what relief the court could grant, it must have been understood, and the record shows that it was understood, that whatever disposition was made of the case the court must first construe the contract; its meaning was the fundamental issue. The question was argued preliminarily, it became the subject of frequent discussion during the course of the hearing, and it was most elaborately briefed upon the submission of the cause. Now if under these circumstances the court can with propriety reopen the issue there might be no end to a suit. Upon being advised of the views and conclusions of the court, the losing

party almost invariably feels that he could strengthen his case if he had another chance. Here it was from the beginning the right and duty of the parties to throw such light as they thought available, upon the meaning of the contract, for, as already stated, that was a plain and inevitable issue. Having been content to submit the case as made, both parties are now bound.

For these reasons the application must be denied, and an order will be entered accordingly.

Endorsed: Filed Nov. 3, 1915. W. D. McReynolds, Clerk. By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

INTERLOCUTORY DECREE.

This cause coming on to be heard at this term of this court and having been duly presented, thereupon, on consideration thereof, it is ORDERED, ADJUDGED and DECREED as follows:

That the defendant Twin Falls Salmon River Land & Water Company contracted with the State of Idaho and with the settlers holding agreements for the purchase and sale of water rights that it, the said defendant, would provide a system of canals and reservoirs on what is known as the Salmon River Project, in Twin Falls County, State of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers' agreements at the rate of two and three-fourths acre feet per acre, measured at the points of delivery from the system into the consum-

ers' laterals; and further that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land & Water Company, et al., v. Vineyard Land & Stock Company, now pending in this court, and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at

the time of such application, and upon the submission of such proof for the entry of final decree.

Dated this 29th day of November, 1915.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Nov. 29, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

And Now Come the defendants, Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and having presented an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree made and entered in the above entitled cause on the 29th day of November, 1915, say that said decree, made and entered as aforesaid, and the decision made and filed by the Court in this cause on the 29th day of June, 1915, are erroneous and unjust to these defendants, and particularly in this:

1. Because the Court erred in holding, decreeing and deciding that the said defendant, Twin Falls Salmon River Land & Water Company, had in its contract with the State of Idaho or in its contracts with the settlers, agreed to furnish water at the rate of $2\frac{3}{4}$ acre feet per acre measured at the points of delivery of the system into the consumers' laterals.

2. Because the Court erred in holding, decreeing and deciding that the defendant, Twin Falls Salmon

River Land and Water Company, had agreed in its contract with the State of Idaho, or in its contracts with the settlers under its irrigation system, that it would not sell water rights in said irrigation system in excess of its ability to deliver $2\frac{3}{4}$ acre feet of water per acre measured at the points of delivery from the system into the consumers' laterals.

3. Because the Court erred in holding, decreeing and deciding that the defendant, Twin Falls Salmon River Land and Water Company and the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and each of them, be enjoined and restrained from collecting or attempting to collect, or from enforcing payment under any contract executed by said Twin Falls Salmon River Land and Water Company for the sale of water rights in the irrigation system constructed by said Company.

4. Because the Court erred in holding, decreeing and deciding in effect that the complainants and other settlers under said irrigation system are entitled to receive water from said irrigation system without making any payments of either principal or interest on their said contracts until such time as the defendants have provided a water supply sufficient to deliver to such settlers $2\frac{3}{4}$ acre feet per acre, measured at the points of delivery of the system into the consumers' laterals.

5. Because the Court erred in enjoining and restraining the defendants, Twin Falls Salmon River Land and Water Company, Commonwealth Trust

Company of Pittsburgh, as Trustee, and A. C. Robinson, from collecting, or attempting to collect or enforce payment of overdue installments of principal and interest under said contracts, and from collecting any sum whatsoever from the settlers for water heretofore or hereafter delivered to such settlers until said defendants have provided for such settlers $2\frac{3}{4}$ acre feet per acre, or given trustworthy assurance to be approved by the Court that such water will be provided.

6. Because the Court erred in holding and deciding that the Twin Falls Salmon River Land and Water Company had issued, or caused to be issued or circulated, a printed circular introduced in evidence as "Plaintiffs' Exhibit 17."

7. Because the Court erred in holding and deciding that the form of contract used in the sale of water rights under the irrigation system of the defendant Twin Falls Salmon River Land and Water Company, being "Plaintiffs' Exhibit C," was prepared by the Company, and that such contract should be construed more strongly against the defendants than against the settlers.

8. Because the Court erred in holding, deciding and decreeing that plaintiffs and other settlers under said irrigation system were entitled to receive more than their pro rata or proportionate share of all water available for distribution from such irrigation system, and that the defendant Twin Falls Salmon River Land and Water Company had in any way agreed or warranted that each settler should receive

2¾ acre feet of water per acre or any other specified amount in excess of his proportionate share of all water available for distribution from said irrigation system.

9. Because the Court erred in holding and deciding that if the settlers' contracts be not construed to require the Company to deliver a specific amount of water per acre, that the Company would be free to sell water rights and undivided interests in said irrigation system without limit.

10. Because the Court erred in holding and deciding that the duty of water or the amount of water required per acre under the irrigation system of the defendant Twin Falls Salmon River Land and Water Company was immaterial.

11. Because the Court erred in declining to consider or admit in evidence the testimony of C. H. Poston, John C. Boren, Joseph Boren, W. M. Worthington, W. T. Holt, J. P. Holmbran, C. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloane, William Wayman, E. B. Darlington, C. C. Thom, A. P. Senior and John Krall, witnesses called by defendants, which testimony was offered for the purpose of showing that the amount of water claimed by the plaintiffs in the bill is unnecessary and is not needed or required for the necessary or proper irrigation of the lands in question; also that the use of the amount of water claimed by the plaintiffs in the bill would be excessive and would be injurious to and impair the value of the lands in question and also that the existing water supply is sufficient for the irrigation of all of

the valid existing land entries upon the tract and that the plaintiffs have not and will not be harmed by any alleged insufficiency of the water supply.

12. Because the Court erred in striking out the evidence of the witness H. M. Sims relative to the making of final proof under the Carey Act and as to the statements made in connection therewith.

13. Because the Court erred in holding and deciding that it is no concern of the defendants that the settler may use water wastefully or to an amount in excess of his reasonable needs.

14. Because the Court erred in holding and deciding that the terms of the agreement here involved were fixed by the defendant Twin Falls Salmon River Land and Water Company, and not by the settler or other party to such agreement.

15. Because the Court erred in holding and deciding without any evidence in support thereof, that at the time the contracts in question were executed, "water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and, with rare, if any exceptions, the amount deemed to be necessary, both popularly and by the Courts, exceed the amount here provided for."

16. Because the Court erred in holding and deciding that the Company had entered into contracts to deliver an amount of water in excess of the capacity of the system, but failed or declined to determine the amount of such excess or the acreage to which the same should be limited.

17. Because the Court erred in failing to enter an enforceable decree or a final decree finally determining and settling the rights of the parties.

18. Because the Court erred in overruling the motion of the defendant Twin Falls Salmon River Land and Water Company to dismiss.

19. Because the Court erred in holding and deciding that it has jurisdiction to proceed with the trial of the cause until all parties interested in the controversy had been brought before the Court and made parties to the cause.

20. Because the Court erred in not dismissing the bill because of the absence of indispensable parties.

21. Because the Court erred in entering any decree in this cause in favor of plaintiffs.

22. Because the decision of said Court is contrary to and in conflict with the laws of the State of Idaho as construed by its highest Court, particularly Sections 1615 to 1629, inclusive, of the Revised Codes of Idaho.

23. Because the decision of said Court and the decree entered herein are contrary to and in conflict with the decision of the Supreme Court of the State of Idaho, construing such contracts and the laws of the State of Idaho under which such contracts were entered into and said irrigation system constructed and water rights acquired, and the same are particularly in conflict with the following decisions of said Supreme Court:

State ex rel West v. Twin Falls Canal Co.,
21 Idaho 410, 121 Pac. 1039.

State v. Twin Falls Canal Co., 151 Pac.
1013.

Idaho Irrigation Co. v. Lincoln Co., et al.,
152 Pac.

Wherefore, the said defendants pray that the decree entered herein, be reversed and set aside, with directions to said District Court to dismiss plaintiffs' bill.

S. H. HAYS,

Solicitor for Twin Falls Salmon River Land and Water Company.

P. B. CARTER,

Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,

Solicitor for Commonwealth Trust Company, Trustee, and A. C. Robinson.

Endorsed: Filed Dec. 9, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

And Now Come the defendants, Twin Falls Salmon River Land and Water Company, a corporation, Salmon River Canal Company, Limited, a corporation, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and conceiving themselves aggrieved by the decree made and entered on the 29th day of November, 1915, in the above cause, and by the decision of the Court rendered herein on

the 29th day of June, 1915, do hereby appeal from said decree and decision, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and the said defendants pray that this, their appeal, may be allowed and that citation issue as provided by law, and that a transcript of the record, evidence, proceedings and papers upon which said decree and decision were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

S. H. HAYS,

Solicitor for Twin Falls Salmon River Land and Water Company.

P. B. CARTER,

Solicitor for Salmon River Canal Company, Limited.

RICHARDS & HAGA,

Solicitors for Commonwealth Trust Company, Trustee, and A. C. Robinson.

ORDER ALLOWING APPEAL.

And Now, to-wit, on this 9th day of December, 1915, *It Is Ordered* that the foregoing petition be granted, and that the appeal be allowed as prayed for, and that the said defendants and petitioners file a bond on appeal in the sum of Five Hundred Dollars (\$500.00), with good and sufficient surety, to be approved by the Court.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Dec. 9, 1915. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON APPEAL.

Know All Men by These Presents, That we, Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, as principal, and the Boise Title and Trust Company, a corporation, as surety, are held and firmly bound unto the complainants named in the above-entitled cause, in the just and full sum of Five Hundred Dollars (\$500.00) for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1915.

The condition of this obligation is such, that,

Whereas, the above-named Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, defendants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered on the 29th day of November, 1915, and also from the decision of the Court rendered therein on the 29th day of June, 1915, in the above-entitled cause, in the District Court of the United States for the District of Idaho, Southern Division.

Now, Therefore, If the above-named defendants,

Twin Falls Salmon River Land & Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, shall prosecute their said appeal to effect and answer all costs, if they shall fail to sustain their said appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In Witness Whereof, The said principals, Twin Falls Salmon River Land & Water Company, the Salmon River Canal Company, Limited, the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, have hereunto caused their names to be subscribed by their solicitors of record, and the said surety, the Boise Title and Trust Company, a corporation, has caused its name to be hereunto subscribed by its duly authorized officers, and its corporate seal affixed, the day and year first above written.

TWIN FALLS SALMON RIVER LAND &
WATER COMPANY, By S. H. Hays,
Its Solicitor.

SALMON RIVER CANAL COMPANY,
LIMITED, By P. B. Carter,
Its Solicitor.

COMMONWEALTH TRUST COMPANY
OF PITTSBURGH, TRUSTEE,
By Richards & Haga,
Its Solicitor.

A. C. ROBINSON,
By Richards & Haga,
His Solicitor.

BOISE TITLE AND TRUST COMPANY,

(Seal)

By S. H. Hays,

Attest:

President.

W. J. ABBS,

Secretary.

Approved this the 11th day of December, 1915.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Dec. 11, 1915.

W. D. McReynolds, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

IN EQUITY—No. 494.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
W. BEAUCHAMP, CARL WASHBURN and
HAROLD M. SIMS, in their own behalf and in
behalf of all persons similarly situated with them,

Complainants,

vs.

TWIN FALLS SALMON RIVER LAND AND
WATER COMPANY, a Corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a Cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, TRUSTEE, and A. C.
ROBINSON,

Defendants.

CITATION.

*The President of the United States to the above-
named complainants, A. E. Caldwell, W. F. Mikesell,*

V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn and Harold M. Sims, and all others similarly situated, and to C. O. Longley, Esq., their attorney, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein A. E. Caldwell, W. F. Mikesell, V. E. Morgan, J. E. Pohlman, W. C. Pond, James W. Beauchamp, Carl Washburn, and Harold M. Sims, are complainants, and Twin Falls Salmon River Land and Water Company, Salmon River Canal Company, Limited, Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, are defendants, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness, the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, Southern Division, this the 11th day of December, 1915.

FRANK S. DIETRICH,

Judge of the United States District Court for the District of Idaho, Southern Division.

Service of the within Citation and receipt of copy

thereof admitted this the 16th day of December, 1915.

C. O. LONGLEY,

Attorney and Solicitor for the Appellees, A. E.

Caldwell, W. F. Mikesell, V. E. Morgan, J. E.

Pohlman, W. C. Pond, James W. Beauchamp,

Carl Washburn and Harold M. Sims.

Endorsed: Filed Dec. 17, 1915.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court, that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and the same is transmitted accordingly.

(Seal)

Attest: W. D. McREYNOLDS,

Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 408 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, in accordance with praecipe on file herein, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$477.30, and that the same has been paid by the appellant.

Witness my hand and seal of said Court, affixed at Boise, Idaho, this 31st day of December, 1915.

W. D. McREYNOLDS,

Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, **SALMON RIVER CANAL COMPANY, LIMITED**, a corporation, **COMMONWEALTH TRUST COMPANY OF PITTSBURGH**, Trustee, and **A. C. ROBINSON**, Appellants,

vs.

A. E. CALDWELL, **W. F. MIKESELL**, **V. E. MORGAN**, **J. E. POHLMAN**, **W. C. POND**, **JAMES W. BEAUCHAMP**, **CARL WASHBURN** and **HAROLD M. SIMS**, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLANT,

Twin Falls-Salmon River Land and Water Company

SAMUEL H. HAYS,

Solicitor for Appellant, Twin Falls-Salmon River Land and Water Company.

J. H. RICHARDS,

O. O. HAGA,

Solicitors for Appellants, Commonwealth Trust Co. and A. C. Robinson.

PASCO B. CARTER,

Solicitor for Appellant, Salmon River Canal Co.

C. O. LONGLEY,

Solicitor for Appellees.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURGH, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLANT, Twin Falls-Salmon River Land and Water Company

STATEMENT.

This suit grows out of the alleged insufficiency of the water supply on the Salmon River Irrigation Project in Southern Idaho. The project is known as a Carey Act Project.

This appeal is from an interlocutory decree in favor of appellees, who were the complainants in the court below, granting an injunction restraining the appellants, who were the defendants in the suit, from collecting any money due from settlers on the project, amounting to two millions of dollars and upwards, until a certain claimed water supply is furnished. The decree in effect is largely

final. The action was brought by settlers on the tract on behalf of themselves and others against the company building the works, the company operating the works and the security holders.

Conditions Giving Rise to the Suit.

The Acts of Congress known as the Carey Act (Sec. 4, Act of August 18, 1894, 28 Stat. 372; Act of June 11, 1896, under head of "Surveying Public Lands," 29 Stat. 413; Sec. 3, Act of March 3, 1901, 31 Stat. 1133), granted to each of the States in the arid region one million acres of land, provided the States would secure the reclamation of such tracts and authorized the States to fix a lien upon the land "for the actual cost and necessary expenses of reclamation and reasonable interest thereon;" in other words, to assess the benefits against the land which would accrue by reason of the making of the proposed improvements.

The State of Idaho, in pursuance of this act, provided by statute (Sec. 1615, R. C.) that proposals and requests might be made to the State Board of Land Commissioners for the building of such works for the irrigation of definite tracts of land to be described in the proposal, the work to be done under the supervision of the State and to the satisfaction of the State Engineer (Sec. 1623, R. C.). This statute may properly be considered as an advertisement for bids for the construction of such works.

The construction company desiring to build such works makes a proposal to build the works for the irrigation of a certain definite tract according to certain definite plans (Sec. 1615, R. C.). This proposal amounts to a bid for the doing of the work. At the time of making such proposal, the statute requires (Sec. 1617, R. C.) that the construction company,

“shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described”

in the proposal. This is merely a convenient way of attaching the water supply to the project. The State Engineer is required by statute (Sec. 1618, R. C.) to determine and report,

“whether there is sufficient unappropriated water in the source of supply, and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the works is adequate to reclaim the land described,”

and other similar requirements. This determination by the State Engineer is final, for, as provided by statute (Sec. 1619, R. C.),

“no request on which the State Engineer has reported adversely as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the land sought to be irrigated shall be approved by the board.”

The plan is one of complete State supervision and control.

The interest which the settler has in the enterprise is defined by statute (Sec. 1615, R. C.), it being required that the proposal shall state

“the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a *proportionate interest in the canal or other irrigation works, together with all the rights and franchises* (water rights) *attached thereto.*”

This proportionate interest is a proportionate interest in the right represented by the water permit taken out

for the project. The settlers are to ultimately own the project.

After approval by the State Engineer and by the Land Board, the plans must be presented under the State and National laws to the Department of the Interior for approval (Sec. 1619, R. C.), after which the Government enters into a contract with the State for the patenting of the lands to the State (Sec. 4, 28 Stat. 372), and the State enters into a formal contract with the construction company to build the works in accordance with the plans before presented and approved (Sec. 1621, R. C.). Entries of these lands are made before the State Land Board. Persons entering these lands must present to the State a contract with the construction company showing that they have agreed to pay the amount of the lien fixed by the State against the land, and that they are entitled to a proportionate interest in the irrigation works and appurtenant water supply (Sec. 1626, R. C.).

The form of contract to be entered into between the settler and the construction company is approved by the State Land Board (p. 259).

The lands are then thrown open for settlement (Sec. 1625, R. C.). The State acts in the matter of making the contract and in the approval of a form of settler's contract, as well as in other matters, as the agent or trustee for the settlers who are in the future to inhabit the tract. The contract with the State for the construction of the works is made prior to any settlement and the form of contract to be entered into with the settlers is likewise determined prior to such time.

Before the making of any contract, the plans must be approved both by the State and the National authorities, and the sufficiency of the water supply determined.

It will thus be seen that the general plan is one providing that the cost of the reclamation of certain arid land shall be assessed as a benefit against the land to be paid by the settler thereon; that the benefit is assessed through the medium of the State Board of Land Commissioners and that the plan provides for State and National approval with supervision of work to be done by a private corporation, and for ultimate ownership of the works and appurtenant water supply by the settlers, each settler having a proportionate right therein, as provided by statute, and no settler having any priority over others, the sufficiency of the water supply having been predetermined.

In this case, a proposal was presented to the Land Board on the 12th day of August, 1907, by the predecessors in interest of the Twin Falls-Salmon River Land & Water Company.

On the 30th day of April, 1908, the State of Idaho entered into a contract with the Twin Falls-Salmon River Land & Water Company for the construction of the necessary irrigation works. This is commonly called the State Contract. This contract fixed the lien upon the land (pars. XIV, p. 58 and VIII, p. 51). Shortly thereafter, a form of contract with the settlers was agreed upon between the construction company and the State, and on the 1st day of June, 1908, the land was thrown open for settlement. Very shortly thereafter (within a month) over 70,000 acres of the land were contracted and entered by settlers (p. 14). The works were substantially completed in the spring of 1911 and consist (p. 191) of a concrete dam 230 feet in height, two tunnels over eleven feet square, having a total length of 3,500 feet, and many miles of distributing canals covering an area of approximately 100,000 acres.

Water was first turned onto the project in 1911 and has been used each year since, the land in cultivation during the various years being as follows (p. 137) :

In 1912.....	16,310 acres
In 1913.....	23,043 acres
In 1914.....	30,064 acres

The following amounts of water were turned out of the reservoir into the canals of the company for use on the lands under the system in the following years, to-wit (pp. 199-200) :

1911	22,843 acre feet
1912	62,827 acre feet
1913	73,000 acre feet
1914	103,000 acre feet

The State Engineer, whose duty it was under the statute to report upon the project at the time of the making of the proposal to the State, reported that the water supply was sufficient for the irrigation of 150,000 acres of land (p. 389), and a water permit of 1,500 second feet for the project was approved by him. The original promoters of the project proposed to build irrigation works for the irrigation of that area (p. 389), which was made up of 127,000 acres of Carey Act land, the balance being school land and desert entries which came under the project (p. 389, 43).

The measurements of the water supply taken in the spring of 1908 proving somewhat disappointing, and the Twin Falls-Salmon River Land & Water Company, commonly called the Construction Company, desiring to act along conservative lines, it was arranged with the State that the works to be constructed should cover only 100,000 acres, with the understanding that the area would be in-

creased to the original amount if the water supply was found to be sufficient.

Later on, it was further arranged with the State that only 80,000 acres of Carey Act land should be opened for entry on the opening day (p. 318) (Sec. 1625, R. C.). Shortly thereafter, contracts were made between the company and settlers on Carey Act desert and State lands covering approximately, all told, 73,348 acres (p. 218). These contracts for the most part were made on the opening day (June 1st, 1908) and probably all of them within a month from that date. This suit was brought on the 16th day of May, 1914.

At the time of the commencement of the suit a large number of Carey Act entries had become invalid by reason of the failure of the entrymen to settle upon the lands and make the cultivation required by the State statute (Sec. 1628, R. C.), so that the project, at the time of the hearing represented an area of 57,348 acres (p. 219) instead of 73,348 acres, as it did shortly after the opening, and instead of 150,000 acres as originally contemplated.

Measurements taken after the original report of the State Engineer show that since the inception of the project, the average annual available water supply has been 130,000 acre feet (p. 192), this being the supply available for the 57,348 acres above mentioned instead of 400,000 acre feet for 150,000 acres as originally reported by the State Engineer. Neither the pleadings nor the testimony contain any explanation of this condition. The water permit was for 1,500 second feet. This amount has been in the stream at times, during the high water season, but not for a long enough period, since the inception of the project, to give a total average yearly flow of more than 130,000 acre feet (pp. 192, 213, 178). It is common knowledge that

the flow of streams in some years is three or four times the amount in other years.

Pleadings and Issues.

This action was brought by certain settlers on the project on their own behalf and ostensibly on behalf of all others similarly situated (p. 36).

The defendant and appellant, the Twin Falls-Salmon River Land & Water Company, commonly called the Construction Company, is the company that built the works. To this company the settlers gave contracts commonly called settlers' contracts in payment for the interest in the works and appurtenant water supply which they were to acquire. These contracts also represented the lien which the State fixed upon the land under the authority of the Act of Congress and provided for the payment of this lien by the settlers in certain small installments covering a period of ten years (pp. 149, 67).

The defendant and appellant, the Commonwealth Trust Company of Pittsburgh, is the party to which the Construction Company assigned the settlers' contracts as collateral for the purpose of securing a bond issue.

The defendant and appellant, A. C. Robinson, is the assignee from the Construction Company of a considerable amount of settlers' contracts, the assignment being made to secure advances of funds.

The defendant and appellant, the Salmon River Canal Company, is the company which, under the contract with the State, will eventually take over the project. The rights of the settlers in the works are represented by shares of stock in this company. Until thirty-five per cent of the price is paid, the Construction Company votes this stock (pp. 11, 53). Except in a few rare instances, the thirty-

five per cent has not been paid (p. 24). This company, usually known as the Operating Company, is a nominal party only, having no financial interest in the suit.

The State Board of Land Commissioners of the State of Idaho was at one time a party to the suit, but a dismissal was afterwards entered.

The bill also alleges that the Twin Falls-Salmon River Land & Water Company, the company constructing the works, entered into a contract with the various settlers under the project whereby it agreed to deliver to them 2.75 acre feet of water per acre during every irrigation season, under a rotation system, or .01 of a second foot of water continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet (pp. 16, 17), or that it agreed to deliver an "ample supply" (p. 18), that being the phrase used in the act of Congress (29 Stat. 413, under "Surveying Public Lands"). The bill was framed on the idea that the contract called for either one or the other of these constructions, or that the Carey Act itself provided the measure of the right, the pleader leaving it to the ingenuity of the Court to determine the matter.

The bill also alleged the making of contracts between the company and various settlers covering 75,000 acres of land (p. 14); that the company did not have available more than 50,000 acre feet of water (p. 17), and that the water supply was insufficient for more than 30,00 acres of land (p. 26).

In order to secure the interposition of equity and sustain the bill and show a substantial and not merely a nominal injury, it was further alleged that 2.75 acre feet of water for each irrigation season, or .01 of a second foot of water continuous flow from April 1st to November 1st

of each year, amounting to 4.16 acre feet, was actually necessary for the irrigation of crops and that the settlers could not get along with less (p. 17).

All of these allegations were denied (pp. 79, 85, 95) thereby raising the issue of the construction of the contract, the necessity and sufficiency of the water supply, and particularly as to whether or not any settler had been harmed by the alleged shortage of water, regardless of the construction given to the contract.

It is the contention of the Construction Company that it never made any contract calling for the delivery of any of the amounts of water specified in the bill. It is a construction company only. At the inception of the project, it was necessary under the law for the company to take out a permit for the appropriation of a water supply for the irrigation of the tract. It was necessary for the State Engineer to examine into and determine the sufficiency of this supply. This was done on behalf of the State, which was acting as the agent of the settlers. The water supply was determined to be sufficient and the works have been constructed. The interest of the settler in the water supply represented by the permit taken out for the tract, is as defined by statute (Sec. 1615, R. C.), a proportionate interest therein.

It is furthermore the contention of the Construction Company that the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres), and it desired to show this fact conclusively. The Court, however, refused to hear any evidence whatever upon the question of the sufficiency of the present water supply for the irrigation of the present area of the project and this is one of our principal assignments of error.

The citizenship of the parties, the building of the irrigation works by the defendant company, the making by the settlers of contracts calling for the payment to the Construction Company by them of \$40.00 per acre, of which amount \$3.00 had been paid, leaving an average balance of \$37.00, the making of a mortgage to secure an issue of bonds, the transfer of the settlers' contracts by the Construction Company to the trustee under the bond issue as collateral for the payment of the bonds, and the assignment of certain contracts to the defendant Robinson were all duly alleged.

For relief the bill asked (p. 37) that an injunction be issued restraining the defendants and appellants from collecting any money upon the contracts given by the settlers; that the amount due from the settlers be held to constitute a trust fund for the purpose of furnishing to each acre of land, providing it could be done, a water supply of 2.75 acre feet per acre, or .01 of a second foot per acre continuous flow from April 1st to November 1st of each year; that if such a water supply could not be found (as the Court found that it could not be in this case), that the area of lands under the project, which the works were built to irrigate and which were already covered by land entries and contracts with settlers, be reduced and cut down and that the contracts with the settlers outside of the reduced area be canceled, and that they be paid damages from the funds to be collected which were claimed to be a trust fund, and that the Court determine the priority of rights among the settlers on the project and that a receiver be appointed to carry out the plans proposed.

This suit was not brought upon the ground of fraud or bad faith, but merely upon the ground that the water supply in the past four years has turned out to be less abun-

dant than anticipated at the inception of the project.

The relief asked amounted to a taking apart and a complete making over of the project, the taking over and impounding of all moneys due or to become due from the settlers and the distribution among them of such funds by way of damages.

Under the plan proposed the project would be cut in half, the settlers on the part remaining would pay the amounts due less any damages to them, the remaining funds being paid by way of damages to those eliminated from the project. Nothing would remain for the investor. It was a plan for benevolent assimilation of the project by the settlers.

The appeal in this case is from an interlocutory decree (p. 393) which, while interlocutory in its terms, is in practical effect largely final. This decree construes the contracts between the parties and enjoins and restrains the defendants from collecting or attempting to collect any money whatever until such time as the settlers on the project have been provided with 2.75 acre feet of water per acre for each season, this amount to be measured at the points of delivery from the system into the consumer's lateral, or are given trustworthy assurance that said water will be provided.

The Court also found that the company was utilizing the entire water supply of the stream which was available and that no other source of supply existed (pp. 281, 305), so that the decree withheld all payments until a wholly impossible condition had been complied with.

So far as we may judge from the opinion and decree, it is the idea of the Court that those persons who, after entry, have failed to comply with the statute of the State (Sec. 1628, R. C.) with regard to the cultivation of their

lands (covering 16,000 acres) have made default and their contracts are practically abandoned and are subject to forfeiture (p. 306). Since the statute of the State has not been complied with, there can be no complaint upon our part to a cancellation of these entries, the settlers' contracts falling with them. This brings the project down to 57,348 acres (p. 219).

The Court speaks of the contracts made with these settlers as being "subject to rescission." Such is hardly the case, strictly speaking. The rights of the parties have been terminated by operation of the State statute. The company has nothing to do with it and has no right of "rescission."

The Court also says:

"It (the company) should be required to exercise its right of rescission wherever it exists and by negotiation, it may reasonably be believed that it may further reduce the irrigable area."

In other words, the Court seems to think that the company may induce some of the settlers to give up their rights under the existing contracts. It would be entirely optional with the settler to do this. But the suggestion is diametrically opposed to the policy of the law, which gives to each settler an equality of right, or in other words, a proportionate interest in the works, and also to the terms of the State contract, which expressly provides that there shall be no priority between settlers (p. 49). If it were necessary to cut down the project, it could only be cut down by a proportionate reduction of the acreage of each settler. It could not be cut down by the elimination of a large body of settlers after the plan proposed in the bill and followed by the Court. The entire water supply cannot be taken and given to a few of the settlers to the exclusion of the re-

mainder. Such a course has no foundation either in the statute or the contract, and there is no occasion arising from the surrounding circumstances for the adoption of such a method.

The Court has apparently proceeded as if it might grant relief along the lines of specific performance and apparently requires that a few of the settlers shall be given a water supply of 2.75 acre feet and that the remainder shall be eliminated from the project; in other words, that there shall be a specific performance of the contract as to a portion of the settlers, the Court finding that specific performance as to all of them is impossible. The theory of the decree is wholly wrong. No definite plan for cutting down the project is shown in the bill. It does not appear who are to be eliminated from the project, although the claim is made that the project must be cut to 30,000 acres (p. 26) instead of 57,348 acres, as it now stands. Who is to suffer by the reduction of the area does not appear; nor is there any plan or design proposed in the bill for the making of the reduction.

It is claimed that this action is brought by the plaintiffs on behalf of themselves and all others similarly situated. This is indefinite. Those who are to remain on the project are situated in one way and those who are to be cut off are situated in another. It does not appear that any of the plaintiffs are among those who are to be eliminated from the project. The lower court frequently called the attention of the plaintiffs to this defect in the proceedings and the impossibility of granting relief without the presence of the parties affected. The direction of the lower court to bring in these parties was disregarded (p. 275). But the Court itself in rendering the decree ignored this feature of the case.

The place of measurement of the 2.75 acre feet of water is fixed by the Court at the point of delivery into the consumers' lateral. There is nothing in the contract to justify this and the theory of the contract and rule of the State courts is directly to the contrary. The place of measurement is a very important item in considering the area to be irrigated.

At the organization of the project the State Engineer reported that, "400,000 acre feet of water can be impounded annually" (pp. 389-390) for 150,000 acres of land or 2.66 acre feet per acre at the point of inflow into the reservoir. One hundred and thirty thousand acre feet at this rate would serve 48,750 acres. But if the supply is increased at the farmers' headgate to the rate of 2.75 acre feet, as decreed by the Court, then the 130,000 acre feet would serve an area problematically stated of 36,000 acres.

A motion to dismiss was made (p. 72) on the ground that the bill did not state facts sufficient to entitle the complainants to any relief, there being no equity stated therein, and also upon the ground that there was a failure to bring in the necessary parties to the suit.

The settlers' contracts are not negotiable instruments. They have been held to be subject to defenses. A settler having just ground may defend in case it is sought to foreclose the lien given by these contracts. In case of a partial failure of consideration, such, for instance, as the partial failure to deliver the water supply contracted for, there are legal rules settling the measure of damages. There are several hundred settlers on the project. Necessarily, if they interpose defenses, the Construction Company may have different answers to these defenses in different cases. Granting the relief asked for in this case would prevent

the Construction Company from interposing such answers to the claims made by settlers.

The relief asked was a cutting down of the acreage in the project and eliminating practically half of the settlers. Under the law this could not be done, because the interests of all settlers are proportionate and there is no priority of right among them; hence, any cutting down of the project must be done proportionately. For these reasons, the bill should not be sustained on the merits.

The parties who are to be eliminated from the project have one interest and the parties who are to remain in it have another. They are not similarly situated. It does not appear in which of the two classes the plaintiffs are, or whether there are sufficient parties before the Court to represent all interests. For this reason, the bill should have been dismissed on account of the non-joinder of necessary parties.

There was an allegation in the complaint (Par. XXIII, p. 24) charging bad management on the part of the company, but no evidence was introduced upon this point. There was also a charge that the method of delivery of the water was unsatisfactory (p. 30), but there was practically no evidence upon this point.

It was also charged that the company (Par. XVII, p. 21), had sold and delivered water to persons not entitled to it. It appeared that less than 1,000 acre feet had been loaned to a company on some adjoining lands during the season of 1914.

It was also claimed that the company had made erroneous representations (Par. XVI, p. 19) in regard to the available water supply. It was sought to show at the hearing (p. 147) that a certain circular had been issued by the company making certain representations in this respect.

It appears from this circular that it was issued by the Twin Falls North Side Investment Company, Limited (p. 155), and not by the Twin Falls-Salmon River Land & Water Company. The circular commences, however, with this statement (p. 147) :

“80,000 acres of Carey Act lands were opened for entry under the canal system on June 1st, 1908. 70,000 acres of this land were filed on during the month of June.”

The circular does not bear date, but it was clearly issued after the 70,000 acres were filed on, and as the area of the project is now but 57,348 acres, (p. 218), this particular circular could not have induced the settlement of the lands. It was evidently a circular issued after entry of 70,000 acres and it devoted itself considerably to the sale of lots in the town of Hollister (p. 155). One of the plaintiffs (H. M. Sims) claimed to have seen this circular prior to the time he purchased his land from the original entryman (p. 156). No other person claims to have done this.

The representations as to the water supply (p. 152) were only substantial restatements of the matters contained in the report of the State Engineer (p. 388). The State and National laws relating to this matter are printed in the Appendix hereto.

SPECIFICATIONS OF ERROR.

1. We are a construction company building irrigation works in accordance with agreed plans covering a certain described acreage of land. We are to receive a definite amount per acre represented by an assessment of benefits, or a statutory lien, in payment for the work. We do not receive payment for “water rights.”

The Court held in substance that we were not a construction company building works but were an irrigation company selling "water rights." (p. 286).

2. Our predecessors in interest took out a water permit in the State Engineer's office for the irrigation of the entire tract as provided by statute. This permit was granted and the sufficiency of the water supply for the entire tract approved by the State Engineer on behalf of the State acting as agent for the future settlers. The settler under the statute and contract has a proportionate interest in the water supply represented by the permit taken out for the project. Such water supply is to be delivered by the Construction Company under a rotation system as described in the contract (p. 55) :

"In such quantities and at such times as the condition of the crops and weather may determine but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system."

The Company was to devise the plan of distribution in accordance with the following provision of the contract (p. 55) :

"It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Limited."

The canals were designed to carry a certain head of water, to wit, .01 of a second foot of water per acre. This head was to be delivered under a rotation system or at certain intervals. There was no agreement that this de-

livery should equal 2.75 acre feet or any other specific amount, the interest of the settler being a proportionate interest in the entire supply belonging to the project, which supply had been previously determined to be sufficient.

The Court held that the contract called for a certain definite amount of water, to wit, 2.75 acre feet, instead of a proportionate interest in the common supply taken for the entire project.

3. The plans were approved by the State and the Department of the Interior, and a formal contract for the construction of the works was made. The State, in approving the water supply, making the contract and dealing with the project, acted as the agent for the settlers thereafter to occupy the lands. The question of water supply under these circumstances, the works having been built long prior to the commencement of the suit, was no longer open to controversy.

The Court held contrary to this, and in substance, that the question of water supply was still open for re-examination.

4. We contend, above all, that the water supply was sufficient for the irrigation of the reduced area of the project; that plaintiffs, even under the construction of the contract given by the Court, could have no relief unless they could show that they were harmed; that this matter of the necessity of the water supply demanded having been put in issue in the pleadings, it was incumbent on the Court to hear the testimony and determine the matter. The Court refused to do this and held that we must furnish to each settler 2.75 acre feet per acre whether it was needed or not, the Court saying (p. 302) :

"If the right granted is too great and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain. It is no concern of the defendants."

In other words, the Court held that the injunction should issue and the relief be granted regardless of whether appellees were injured or not.

5. The rights of the settlers under the statute and under the contract are proportionate and there is no priority between them. But the Court in effect provided that the project must be made over and the area cut down, and that this must be done by cutting off a large number of existing farms instead of cutting down the area of each farm proportionately, and that no payments need be made until the impossible conditions imposed had been complied with. Apparently the decree in effect is based on a specific performance for about one-half of the settlers on the tract, eliminating the others.

6. The place of measurement of the water supply was held by the Court to be at the place of diversion into the farmer's canal. The estimate of water supply made by the State Engineer originally was on the basis of the amount running into the reservoir. The place of measurement fixed by the Court has no foundation either in the contract or in the law.

7. The bill should have been dismissed—

(a) Because sufficient facts were not stated to sustain it; and

(b) Because the necessary parties were not before the Court.

(a) The interest of the settlers is proportionate. No settler has a priority over another. The bill sought to have substantially one-half of the project eliminated. No

such relief could be granted and the bill itself on its face, under the statute, showed that the interest of the settlers was proportionate and, therefore, that the relief asked could not be granted. Therefore, the bill should have been dismissed for the lack of any statement of facts to sustain it.

The question of water supply was determined in advance; otherwise, no contract between the State and the Construction Company would have been made under the law. The State, in determining this matter, acted not only upon its own behalf but on behalf of the future settlers. It appearing on the face of the bill that the water supply had been predetermined it was no longer open to controversy and the bill itself failed to state any facts justifying equitable relief.

In case of the foreclosure of the liens represented by the settlers' contracts, the settlers could present any defenses which they might have. In some cases, the holders of these contracts might have a sufficient answer to these defenses. Some of the settlers are original entrymen holding contracts direct from the company. All of the persons who testify in regard to the matter (pp. 189, 159, 167) appear to be persons who have purchased from the original entrymen. There are varying circumstances under which proper and sufficient answer might be made to these defenses by the settlers. The appellants, however, in such a case as this, are deprived of the right to make such just answer as they may have to the individual claims of settlers. The settlers, therefore, should be left to their defenses in any actions which may be brought against them. In this condition of affairs, the bill did not state facts sufficient to call for the equitable relief demanded.

(b) Substantially one-half of the settlers, under the theory of the bill, are to be eliminated from the project.

The other half are to remain. The parties whom it is proposed to eliminate from the project have a different interest from the parties who are to remain. Who are to be eliminated from the project and who are to remain does not appear from the bill, and no plan for determining the matter is set forth in the bill. Under the circumstances the parties are not similarly situated, and it does not appear that sufficient parties are before the Court to represent all interests. The objection on this ground should have been sustained and the bill, for the reasons given above, should have been dismissed.

8. We asked leave to introduce additional evidence, including a number of records showing the history of Carey Act contracts in Idaho in order to explain the contract (pp. 308-391). This matter consisted chiefly of public records bearing upon the subject. The decree being merely interlocutory, the additional evidence should have been considered if pertinent. On its face it appears to be pertinent, since it consists chiefly of well known public records, its truth must be admitted, at least so far as the documents are concerned and the conclusions necessarily drawn from them.

9. The court refused to follow the decision of the State Supreme Court construing Carey Act contracts.

ARGUMENT.

Generally speaking, the errors of the Court complained of belong to four general classes:

1. Errors relating to procedure:

(a) In excluding the testimony offered by appellants in regard to the duty of water. This testimony was directed to the question as to whether or not the plaintiffs had been harmed by the alleged deviation from the claimed

contract quantity of water. Appellants sought to show that the existing area could be successfully irrigated with the existing water supply and that appellees therefore had not been injured. This testimony was excluded (p. 395, Specifications 10,11).

(b) Refusing the application for leave to introduce additional testimony in explanation of the contract. This testimony in substance brought into the record documents that have been public records for many years and most of which the lower Court might take proper judicial notice of. This testimony was refused (pp. 308-391).

(c) Denying the motion to dismiss the bill (p. 395, Specifications 18, 19, 20, 21).

2. Error in the construction of the contract (p. 395, Specifications 1, 2, 7, 8, 9, 10, 13, 14, 15, 22, 23).

3. Errors relating to relief granted (p. 395, Specifications 3, 4, 5, 16, 17, 21).

4. Error in refusing to follow the decisions of the State Supreme Court and errors growing out of various subsidiary questions.

Error in Refusing Testimony as to whether the Appellees have been Injured or not.

(a) The pleadings raised the issue as to whether or not the amounts of water claimed, to wit, 2.75 acre feet of water, or .01 of a second foot of water continuous flow, were *necessary* for the irrigation of the land; the statement appearing in Par. XIV (p. 17 of pleading) being as follows:

“That in order for the settlers on said tract to comply with the provisions of said Carey Act and to irrigate and reclaim said land, or to raise ordinary agriculture crops thereon, at least one-half miner’s inch per acre (.01 of a second foot) continuous flow throughout the entire irrigation season, or at least

2.75 acre feet of water per acre if delivered by periods of rotation as the needs of the crops demand, *is and will continue to be necessary*, * * * and that such amount of water above stated *is and will continue to be necessary* even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops."

A further statement with the same purpose is found in Paragraph XV (p. 18) of the bill.

The allegation of *necessity* was denied in the answer (par. 14, p. 79; par. 21, p. 85; par. 35, p. 95). It is very evident that the pleader considered it necessary to set up in the bill that the amount of water claimed, by reason of the contract, was necessary for the irrigation of the land in order to show that there was no remedy at law and that the plaintiffs and other settlers on the tract would suffer irreparable injury in case an injunction was not granted and a receiver appointed.

Taking the construction of the contract as claimed by the plaintiffs, still, if they had suffered no harm, an injunction would not issue; in other words, if the water supply was sufficient notwithstanding a deviation from the alleged contract, the remedy by injunction and the appointment of a receiver would not be available. So they sought to show that they were injured by the deviation from the contract and they therefore alleged that the amount of water claimed was absolutely necessary for the production of crops.

The rule is that to entitle plaintiffs to injunctive relief they must establish, as against defendants, an actual and substantial injury and not merely a technical or inconsequential wrong entitling them to nominal damages only.

16 Am. & Eng. Encyc. L. 360.

Joyce on Injunctions, Sec. 24.

Atchison v. Peterson, 20 Wall. 507.

North Fork Water Co. v. Medland, 187 Fed. 163.

San Joaquin, etc., Co. v. Fresno Flume Co. 158
Cal. 626.

The allegation that the water was necessary for the irrigation of the lands was therefore properly inserted in the bill if the plaintiffs desired the relief asked for.

The necessity of the water supply claimed being in issue, the refusal of the Court to hear any testimony in regard to the required supply was erroneous (pp. 225, 235-6-7, 265, 302). The plaintiffs introduced no testimony to show that they were injured by the alleged shortage of water supply.

When the defendants sought to introduce testimony to show that the existing supply was sufficient for the existing area of the project, the testimony was excluded. For the purpose of showing the amount of water that was necessary, it was proper to show the nature and character of the soil, the character of the crops to be raised, the manner of irrigation and the frequency with which water should be applied. It was to this latter question that the objection was made and sustained (p. 225).

The bill was peculiarly drawn and very uncertain. In the contract with the State there was a clause relating to the *size* of the reservoir (pp. 44, 48) and it was stated,

"that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water which amount, in addition to the normal flow of said stream, during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

This was the only statement in the contract relating to the water supply of 2.75 acre feet per acre, but it is set up in the bill (p. 17),

“that at least 2.75 acre feet of water, if delivered by periods of rotation as the needs of the crops de-

mand, is and will continue to be necessary.”

In various parts of the State contract a *capacity* of .01 of a second foot of water is provided in the canals for each acre of land (pp. 48, 50, 54). With this in view, it was alleged in the bill (p. 17) that a water supply would be required of

“at least one-half miner’s inch per acre continuous flow throughout the entire irrigation season.”

The term “one-half miner’s inch” is not used in any of the contracts. It is equivalent to one-hundredth of a second foot and it is stated in the bill (p. 19),

“that one-half miner’s inch per acre continuous flow is equal to about 4.16 acre feet per acre”

for the season.

But in addition to this, and throughout the bill (pp. 17, 18, 23, 24), there are references to the Carey Act and the necessity of complying with the terms of said act and procuring the necessary water therefor. For instance, it is stated in paragraph XIV of the bill (p. 17)

“that in order for the settlers on said tract to comply with the provisions of the said Carey Act and to irrigate and reclaim said land, or to raise ordinary agricultural crops thereon,”

that at least one-half miner’s inch per acre continuous flow, or 2.75 acre feet per acre, if delivered by rotation,

is and will continue to be "necessary," and it is further stated in the same paragraph:

"and any less amount will be wholly insufficient to raise ordinary agricultural crops and will not enable the complainants and settlers upon said tract to comply with said Carey Act regarding a permanent water supply to reclaim said land."

In paragraph XV of the bill (p. 18), it is stated:

"that it was provided for and contemplated by the said State contract and the said settlers' contracts, that an ample supply of water was and would be provided and actually furnished through the said irrigation works * * * sufficient * * * to thoroughly and properly irrigate, reclaim and cultivate each acre of said land so as to comply with said Carey Act and the desert land laws of the United States and the laws of the State of Idaho."

This provision further states that it was contemplated that the amount to be furnished should be .01 of a second foot continuous flow, amounting to 4.16 acre feet in the season, or 2.75 acre feet if delivered by rotation.

The Carey Act is a desert land law. The first enactment (28 Stat. 372, Sec. 4) provided that the land should be reclaimed

"as thoroughly as is required of citizens who may enter under said desert land law,"

and it was provided in the original act that as fast as the State should furnish proof that any of the lands

"are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State, or to its assigns, for said land so reclaimed and settled."

In a later act (29 Stat. 413), it was provided that liens might be created by the State against the land for the actual cost and necessary expenses of reclamation,

“and when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such State without regard to settlement or cultivation.”

Taking these statutes into consideration, and the statements in the pleading, it is clear that the pleader in drawing the bill considered that it was necessary to show that the amount of water was not such a supply as was called for by the Carey Act, that is, that it was not sufficient to reclaim the land; and, in addition to this, the pleader sets up that the amount which is required to reclaim the land is either .01 of a second foot continuous flow, amounting to 4.16 acre feet, or else 2.75 acre feet delivered by rotation during the season.

If this view is taken of the pleading, then the question as to the sufficiency of the water supply, under the pleadings, is purely a question of fact, the question being as to what area the water supply will reclaim. Such being the case, the testimony in relation to the sufficiency of the supply should have been admitted.

The Court took the position,

“if the right granted is too great and the settlers attempt to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain. It is no concern of the defendants.”

The above decision of the lower court in this respect is directly opposed to the decisions of the Supreme Court of the State of Idaho in similar matters. That Court said, in the case of *Niday vs. Barker*, 16 Ida. 73 (79) :

“The theory of the law is that the public waters of the State shall be subjected to the highest and greatest duty. The fact that a water user and consumer

has a rental right for a fixed number of inches of water does not of itself entitle him to that amount of water unless he can and will apply it to a beneficial use, and whenever he ceases to apply any part of it to such use, his right to have that amount turned out to him ceases for the time being and the extra quantity becomes at once available for another user and consumer."

In the case of *Abbott v. Reedy*, 9 Ida. 577 (581), the Court said :

"It is true that he (the appellant) had been using about two inches per acre, but the law only allows the appropriator the amount *actually* necessary for the useful or beneficial purpose to which he applies it. The inquiry was, therefore, not what he had used but how much was actually necessary."

The appellants have no means of procuring the money invested in the project other than through the medium of payments made by farmers who successfully cultivate the soil. The money must come from the land. We have no desire, therefore, to impose upon the settlers a duty of water or method of irrigation which will not produce practical results. We desired to show just what amount of water was necessary for the reduced area of land and by what manner and method its irrigation could be successfully accomplished. The Court could not take judicial notice that the appellees had been injured or the extent of such injury. Proof must be introduced. Under the pleadings the testimony was admissible.

Refusing leave to Introduce Testimony Explaining the Contract.

(b) The Court said in the opinion (p. 303) :

"It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings.

Possibly knowledge of what, at the time they were executed, was generally understood to be a reasonable amount of water for irrigation needs, might be of some assistance in determining the meaning of the parties attached to the phraseology employed."

We had thought at the hearing that the Court took a contrary view because it was stated (p. 262) :

"My present impression is that primarily this is a question of the construction of this contract and that this testimony (as to the duty of water) would not assist us in construing it."

We were of the view that the Court would render no decree construing the contract until further parties were before the Court (pp. 272-4). We believed the contract, upon its face, did not call for explanation. The matters set up in the affidavit (p. 308) were, most of them, referred to in the argument before the Court. They are chiefly historical and are well known to the local courts. In order that these matters might be made matters of record, they were inserted in the affidavit. There is very little in the affidavit outside of the reference to public records.

This was not an application to reopen the case in the ordinary sense for newly discovered evidence, but rather to bring before the Court the history of this form of contract as shown by well known public records and documents.

The report of the State Engineer upon the project in question had not been presented in evidence for the reason that the State Contract having been executed, the existence of a proper report by the State Engineer would be presumed.

It was, however, pertinent to show the conditions under which the State Engineer acted and this and all of the

other matters referred to in the affidavit should have been considered by the Court. The truth of the records referred to in the affidavit cannot be disputed. The Court evidently, however, decided the matter on its merits because it says (p. 392) :

“But it is doubtful whether the facts suggested, and none other, were admitted to be true, they could be given effect.”

In the management of the case we may have been mistaken as to the proper method of conducting the suit, and as to whether or not it was necessary to introduce matter explanatory of the contract of the character proposed. One of the counsel in this case had much to do with the Carey Act contracts and did not desire to appear as a witness if such a course could be avoided. We felt that the Court would welcome any additional information which would throw light upon the contract. We did not think the Court would consider the matter from the mere standpoint of speed in the presentation of the matter; that is too narrow a view.

Where an interlocutory decree has been rendered, the case is still in the control of the Court and an error in such decree may and ought subsequently to be corrected whenever it is discovered.

Fourniquet v. Perkins, 16 How. 82.

Latta v. Kilbourn, 150 U. S. 524 (540).

Blythe v. Hinckley, 84 Fed. 288 (234).

Pittsburg C. & St. L. Ry. v. Baltimore & O. R. Co.
61 Fed. 705 (708).

N. K. Fairbanks Co. v. Winsor, 124 Fed. 200 (202).

The information therefore contained in the affidavit (pp. 308 to 391), if pertinent, should be considered. That

it was pertinent, will appear in a discussion of other points in the case.

Error in Denying Motion to Dismiss the Bill.

(c) This action is brought by eight plaintiffs, as stated in the bill, in their own behalf and on behalf of all persons similarly situated (Par. 10, p. 13; Par. 34, p. 36).

It was alleged that the water supply was insufficient for more than 30,000 acres of land (p. 26) and that we had an available water supply of not over 50,000 acre feet (p. 17). That it was necessary to make over the project and entirely eliminate a large number of the settlers. The present size of the project being 57,348 acres, the acreage to be cut off from the project as it now exists would be, according to the pleadings, 27,348 acres. Whether the plaintiffs or any of them were located upon the area to be cut off or not, or whether those persons who were to be eliminated from the project were represented does not appear. It is quite true that all of the settlers had the same kind of contract, but it is very evident from the relief sought that there were at least two interests, those who are to remain and those who are to be cut off from the project. They were not all similarly situated.

They have no common right which the bill seeks to enforce. Such right or interest is necessary.

Smith v. Swormstedt, 16 How. 288.

Therefore, the Court should have before it representatives of these various interests and the Court at one time so indicated (p. 275). The suggestion was not followed. There was therefore a fatal defect as to parties and the

bill should have been dismissed for this reason. It nowhere appears that the appellees fairly represent all of the interests in issue.

The motion to dismiss should also have been granted for another reason. No equity was stated in the bill.

The interest of the settlers under the statute is proportionate (Sec. 1615, R. C.). No settler has a priority over another. This is a result of the proportionate interest. It was also stated in the contract (p. 49). The bill sought to have substantially one-half of the project eliminated, but the bill did not sustain the relief asked or any part of it, for the reason that if any cut could be made in the project, it must be a proportionate one instead of an elimination of an integral part of the project.

No equity was stated also for the reason that the water supply was determined in advance and it is not now open to question. Having been approved by the State acting as the agent for the settlers prior to their settlement, and the settlers having later entered into contracts under these conditions, the question of water supply is not now open for consideration.

State v. Twin Falls Canal Co. 21 Ida. 410.

State v. Twin Falls Canal Co. 27 Ida. 728.

The above cases control and govern this case.

There were two principal things decided in advance of the construction of the project:

1st. That the water supply was sufficient; and

2nd. The amount of the lien to be fixed upon the land which was to be paid by the settlers.

If the question of the water supply is still open for consideration, then, likewise, the question of the amount of the lien would be open for consideration; but it has

been held that the amount of the lien, as settled in advance, cannot be changed.

In the case of the Idaho Irrigation Co. Ltd. v. Pew, 26 Ida. 272 (278), the Court said:

"Before the state and the constructing company can enter into any contract for the reclamation of a tract of land, they must have agreed upon the estimated cost of construction and the corresponding price to be charged for water rights, in order to defray such cost. That agreement as to cost is the basis of the contract between the company and the state. Again, when the company first comes into relation with the settler, it must have contractual assurances from him that he will reimburse it for his share of this estimated cost, and the settler on the other hand must be safeguarded by a fixed contract price for the water right if he enters upon the land. This arrangement impresses us as not only unavoidable in the very nature of the conditions existing, but as eminently fair and just to all parties. If the prospective settler considers the estimated cost of construction excessive he need not contract for the purchase of water rights under that project. He is under no compulsion to contract with the company at all. He is not dependent on the company when he makes his contract with it, for the law does not permit him to enter the land before he makes the water right contract. If he does enter into a contract for the purchase of water rights to be paid for in installments, subject to foreclosure if the deferred payments are not made, it must be assumed that he does so with his eyes open, with the knowledge that the contract is one specifically authorized by statute, and at the same time receiving the assurance that he is protected by the provisions of the national Carey Act amendment, the effect of which is, that the lien cannot attach until the company has fully executed its part of the contract. (*Childs v. Neitzel*, supra.)

"After the recitals of the settlers' contract with the company the first article of the agreement begins as follows: 'This agreement is made in accordance with the provisions of said contract between the

state of Idaho and the company, which, together with the laws of the state of Idaho, under which this agreement is made, shall be regarded as defining the rights of the respective parties.' In making that contract the settler assents to the estimate authorized by the state as to the cost of reclamation. Can he then be deemed to reserve any right to have another or later estimate made of the cost of constructing the works? We think not. He has contracted to make these payments with full knowledge of all these facts and circumstances, and in an action to foreclose the lien is estopped and precluded from questioning or denying that the price fixed by the contract represents the actual cost of reclamation and reasonable interest thereon, as contemplated by the Carey Act.

"Suppose, on the other hand, that the estimated cost is largely exceeded by the actual cost of construction, as is said to often be the case. Could it for a moment be maintained that the construction company would be entitled, under authority of the national act, to a lien sufficient to cover that increased 'actual cost,' in the face of the contract which it had made?"

The bill was insufficient also for the reason that, in case of foreclosure of the liens represented by the settlers' contract, the settlers could present such defenses as they had. In some cases, the company might have a sufficient answer to these defenses. All of the plaintiffs who testified upon the point are purchasers from others and not original settlers (pp. 185, 171, 189, 159, 167). The company might make different answers to the settlers' defenses as individual cases might require. They are prevented from doing so in this case. If in individual cases the defense was interposed that the settler had not received all that he was to pay for the rule would be that he might have a deduction made for the difference in value between the thing contracted and that received, but if the

water right actually received was sufficient for the purpose and no injury had been suffered, then only nominal damages could be recovered and the question would be one of fact. It was this rule and this condition that appellees desired to avoid (bottom p. 276-7).

In this case, there was no occasion for the intervention of equity as here claimed because the settlers could fully protect their interests in the cases brought to foreclose the liens. The authority of equity to prevent a multiplicity of suits does not extend to shutting out such defenses as we may have to settlers' claims.

Construction of the Contract.

In the construction of the contract we must consider the Carey Act, the State statute, the contract between the State and the Construction Company, and the contract between the Construction Company and the settler.

Some consideration of the purpose and history of the Carey Act is necessary. The plan of the Carey Act seems to have been brought about by reason of the difficulties which had arisen chiefly in Colorado and possibly in some adjoining States in the construction of irrigation works.

The individual ditch was doubtless the earliest form of irrigation development.

Next came the co-operative or mutual ditch built by a number of settlers for their common purpose. Their interests in these canals were sometimes represented by shares of stock and sometimes by deeds and occasionally by no writing whatever.

Kinney on Irrigation, Secs. 1459, 1479 to 1489.

Mead's Irrigation Institutions, pp. 48-59.

Chandler's Elements of Western Water Law, pp. 106-119.

After the cheaper developments were made, it became apparent that large capital was necessary, and during the period from 1880 to about 1890 many ditches were built throughout the west by corporations organized for that purpose.

Annual Report, Office of Experiment Stations,
Department of Agriculture, 1910, p. 461.

The general plan of operation of these corporations was to provide a charge for a "water right" and, in addition, an annual charge. Instances of this form of contract may be found in the decisions of the courts.

Boise City Irr. Co. v. Clark, 131 Fed. 415.

Wheeler v. Northern Colorado Irri. Co. 17 Pac.
487.

Wilterding v. Green, 4 Ida. 473.

This method of operation, however, was done away with either by statutory or constitutional provisions, or by the decisions of the courts.

Mill's Irrigation Manual, p. 141.

Idaho State Constitution, Art. XV, Sec. 4.

This necessitated the adoption of other methods of development and plans were provided whereby corporations constructed the works and eventually turned them over to the settlers. Some were turned over to the settlers after a certain amount of stock was sold. These seemed to have occasioned little litigation. Others were turned over when the "estimated capacity of the canal" was sold. Much difficulty arose out of this arrangement.

Kinney on Irrigation, Sec. 1516-1519.

At that time, settlers generally acquired rights of priority under a canal by virtue of settlement and cultivation in the same manner as prior rights were acquired on a stream by virtue of appropriation.

Art. XV, Secs. 4 and 5, Idaho State Constiution,
Secs. 3287, 3289, 3290 and 3291, Revised
Codes.

Mellen v. Gt. Western Co. 21 Ida. 353.

These provisions related to companies "selling water" and not to mutual companies, or companies building works only.

The next form of development came under the Carey Act and the difficulties which had arisen greatly influenced the provisions of the act.

The remedy for the evils was outlined in the report of the State Engineer of Wyoming for the years 1893 and 1894, p. 29, as follows:

"WHAT SHOULD BE DONE."

"7th. The location of ditches ought to be in accordance with a prearranged plain. The plans of all large works ought to be subject to State supervision and State approval. The price of water rights ought to be fixed by prior contract with the State. They should be based on the cost of work, and, in justice to both settler and ditch builder, no arbitrary or extreme departure from this price should be permitted.

"8th. Land to be reclaimed ought to be reserved for actual settlers and users of water. Their opportunity to acquire title to such land should be conditioned on the securing of a water right for the land. This is a measure required for the protection of both ditch builder and actual home seeker.

"9th. No canal should be constructed which contemplates furnishing water for hire. Experience has

shown that such canals are prolific of controversies and that water is supplied at less cost to user when the farmers below a canal own and operate it. There is a further reason for this. In this State the water appropriated goes with the land; if the canal also goes with the land it obviates the creation of carrier rights as distinct from user rights.

"10th. Provisions similar to these have been incorporated in the water laws of the foremost irrigation States of the old world. As an enlightened, self-governing State we should not longer disregard the teaching of their experience."

The original Carey Act had been passed just prior to the making of this report and some attention is given to it on pages 29 and 30 of the report. In this report likewise much is said under the head of "Limitations of Rights to Water" (p. 32), and these statements show the prevailing view among State Engineers at that time.

In the report of the State Engineer of Wyoming for the years 1895-96, p. 20, there is an outline showing the advantages of the Carey Act and the Wyoming statute enacted in pursuance thereof from the investor's standpoint. There is also a statement of the advantages from the settler's point of view (p. 21). These advantages are stated as follows:

"1st. Cheap land. Fifty cents an acre; less than one-half the price paid under the desert land law.

"2nd. A State guarantee that there is water enough in the source of supply and that the canal has sufficient capacity to deliver it.

"3rd. A secure water right. Every owner of a home under this law has a title to both elements which make it productive. There is no controversy as to whether the canal builder owns the water and can charge what he pleases, or, as to whether the land owner is its possessor and can do with it as he pleases. The water rights acquired under this Act

belong to neither. They attach to the land reclaimed and are inseparable therefrom.

"4th. An ownership in the canal, a voice in its management, security from oppressive water right charges, and relief from the perpetual mortgage which goes with separate corporate ownership of canals."

The criticisms of the Carey Act then made appear on page 23. At this period of development, State supervision was a very popular movement and the plan whereby the sufficiency of the water supply and cost of the works should be decided in advance was expected to do away with all of the difficulties that had theretofore arisen. All settlers under the canal system were to have the same kind of water right and disputes between them were to be done away with. The supervision of the State was to be paramount. The decision as to the water supply and the price per acre were to be final and conclusive. The State was acting as the agent for the future settlers.

In speaking of the Carey Act, it is said in Mead's Irrigation Institutions (page 25):

"Irrigators own both the canal and the land, however, and know before entering upon the ownership what they are to pay for both and that there will be an ample supply of water."

The period from 1890 to 1900 was a period of considerable development under the irrigation district law and the taking over of works built by private corporations which had previously failed. The district law provided for the assessment of benefits against the land to be benefited.

The Carey Act followed the same plan. The State was authorized to assess the benefits against the land to be

reclaimed. The amount of this assessment was limited to, "the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

These provisions of course should receive a fairly liberal construction for the purpose of effectuating their object. The Land Board was required to determine in advance what assessment would be made and to fix the lien upon the land which the settler must pay.

The lien upon the land once fixed by the Land Board, the action as final.

Idaho Irr. Co. v. Pew. 26 Ida. 272.

Idaho Irr. Co. v. Lincoln Co. 152 Pac. 1058.

The terms of the grant were that,

"the Secretary of the Interior * * * be and hereby is authorized and empowered upon proper application of the state to contract and agree from time to time with each of the states in which there may be situated desert lands * * * to donate, grant and patent to the state free of cost for survey or price such desert lands."

And by the first amendment of June 11th, 1896, the State was authorized to create a lien on the lands.

"and when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract or tracts of such lands, then patent shall issue for the same to such state without regard to settlement or cultivation."

It was claimed by the State of Wyoming that when the plan had been approved by the Department of the Interior and the contract made between the Government and the State, that this amounted to a grant in presenti.

The Attorney General of the State, in an opinion to the State Engineer, so held.

Report State Engineer of Wyoming, 1901-2, p. 52.

Wyoming was the home of the Carey Act idea. Dr. Elwood Mead, State Engineer of Wyoming, was probably the originator of the idea and Senator Carey, whose name the act commonly bears, was its earnest advocate.

Wyoming was the first State to accept the benefits of the act. Idaho followed shortly afterwards and copied the provisions of the Wyoming law.

The question does not necessarily arise in this case as to whether or not the approval of the plan by the Government is final and conclusive and whether the works being thereafter built, the patent must issue. It would be a hardship if such were not the case, and this has been recognized by the Department of the Interior.

In his annual report for the year 1911 (pp. 11-12) the Commissioner of the General Land Office, in speaking of these projects, says:

"The importance of this (the examination of projects) cannot be over-stated for not only will the lands remain segregated for long period of time if the order therefor is once made, but in making such segregation, the Department is practically committed to the feasibility of the proposition submitted by the State and people thereafter dealing with the State are in a great degree entitled to regard the proposition of the State as having received the endorsement of the Department."

Leaving out the question as to whether or not the Government is finally bound by its acceptance of the plans or not, it is unquestionably true that the State is. The State enters into a formal contract for the building of the works, and this contract, following the provisions of

the National Law, is in effect a construction contract only.

Section 1615 of the Revised Codes relates to the proposal to construct the works and defines the interest of the settlers in the works which are to be built as a proportionate interest. The things that the contract between the State and the Construction Company shall contain are matters of statutory regulation.

Section 1621 of the Revised Codes provides that:

“Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers, and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State.”

The contract to be drawn under this statute is clearly a construction contract. The bond given is for the construction of the works.

Under Section 1622 of the Revised Codes, the forfeiture of the bond is to take place upon a failure to construct the works. The whole plan of the State statute is in conformity with the Act of Congress.

A water permit having been taken out for the benefit of the land on the project and the water supply represent-

ed by this permit having been determined in advance to be sufficient, the rights of the settlers having been defined by the statute as being a proportionate right in this water supply, it was not necessary that the statute should require anything further in the contract with the State than the construction of the works and the giving of the bond therefor, and it was upon this plan that the statute was drawn and the proceedings under it had.

That the contract is only a construction contract has been definitely settled by the State.

The rules and regulations of the State Board of Land Commissioners in relation to the Carey Act, adopted June 10th, 1905, page 6, states as follows:

"The company entering into this contract with the state is related to the undertaking simply as a 'construction company, whose duty it will be, under the provisions of the state law and terms of the contract, to build a canal under the supervision of the state; the money spent in such construction being secured by the land which the canal is designed to irrigate. The works will be sold to the settlers who enter the land, at a price agreed upon with the state. Before the settler may enter the land, however, he must contract to purchase a share in such works for each and every acre of land which he desires to enter, each of the shares representing a certain carrying capacity in the canal system which in every case will be sufficient to deliver the water required for the irrigation of his land."

And the same provision is found in the rules and regulations of the Land Board adopted October 16th, 1909, page 6, and this construction has been followed by the Supreme Court of the State.

State ex. rel. West v. Twin Falls Canal Co. 21 Ida. 410 (see bottom of page 424).

Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058 (1061).

The lower Court said (p. 286) :

“The clear purport of the entire instrument is the sale of the water right and that is undoubtedly the sense in which the company expected it would be understood and in which it was understood by the settler.”

The view of the lower court does not accord with the statements of the Land Board or the decisions of the Supreme Court, or the policy of the law under which the contract was drawn, or, as we will show later, with the contract itself.

The history of the act in Idaho and the contracts made under it further illustrate the view to be taken of the contract. This history is shown in the affidavit filed with the application to introduce further testimony (pp. 308, 391).

In 1899, about the time when the Carey Act idea began to gain headway in Idaho, the State Engineer and Attorney General of the State prepared a compilation of the irrigation laws and a set of regulations for the use of the State Land Board and the State Engineer's office in relation to the Carey Act and in connection therewith, prepared a form of contract to be made between the State and persons desiring to construct irrigation works under the terms of the Carey Act (p. 308). A copy of this form of contract is attached to the affidavit. It is found in the rules and regulations of the State Land Board of 1899, at page 100 to 107, and in the record herein at page 319 to 333.

In this form of contract, the interests of the settlers in the works were described as “shares or water rights” (p. 321) and the plan proposed was to convey by deed to each entryman of land

“a water right or share in the said canal for each and every acre owned, filed upon or purchased from the State.”

In one or two of the earlier contracts this method was used but it was found that it was necessary to provide the settlers with an organization in order to levy assessments and take proper care of the irrigation works, so that in subsequent contracts it was provided that a corporation should be organized for the purpose of operating the canal and that the water rights or shares in the canal should be represented by shares of stock in the company which was to own and operate the canal, commonly called the Operating Company. This idea was first incorporated in the contract between the State and the Twin Falls Land & Water Company (p. 348).

In the form of contract originally drawn, paragraph nine related to the water supply which the settler was to receive (p. 326), the relevant portion of this contract being as follows:

“The said party of the second part shall, upon the sale of shares or water rights in said canal as hereinbefore provided, dedicate the said shares or water rights to the land owner, or entered by the same person or persons purchasing such shares, and the terms of said dedication shall provide that each and every acre of land owned or entered under the provisions of the act first mentioned in this contract, by the person or persons purchasing said shares, shall have a right to the use of at least acre feet of water to be delivered from the said canal during each and every irrigating season, said amount to be measured at or within one-half mile from the place of intended use, in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn or by rotation, as will best

protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part, and that it shall meet the approval of the State Engineer."

The provision contained in the ninth paragraph of said contract was first found in the contract with the American Falls Company made in 1901 (p. 333); in that contract it being provided that two and one-half acre feet of water should be delivered to the settler during each irrigation season.

In the Mullins contract, made in 1902 (p. 335), it was provided that the settler should have the right to the use of at least three acre feet of water to be delivered from the said canal during the spring flow of the Malade River during each and every irrigation season, said amount to be measured at or within one-half mile from the place of intended use in such quantities and at such times as the user thereof may desire when the supply is plentiful, but during periods of scarcity it shall be delivered to the users in such heads and at such times as the condition of the soil, crops and weather may determine, etc. The flow of this stream was large during the early spring and much less later on; hence the provision that three acre feet might be applied early in the spring in order that the ground itself might be used as a reservoir so far as possible.

Report State Engineer 1899-1900 p. 75.

The next contract was with the Twin Falls Land and Water Company in 1903 (p. 337). It was in this contract that provision was first made for a corporation to operate the canal and for certificates of stock represent-

ing the interests of the settlers. The ninth paragraph of the contract was therefore changed accordingly. It reads as follows (p. 350) :

"The certificates of sale of water rights and the certificates of shares of stock of the Twin Falls Canal Company, Limited, shall each upon being issued to the purchaser or holder of land under the canal system, be made to indicate and define in the contract or certificate, as the case may be, the amount of water, to wit: One-eightieth of a second foot allotted to each acre represented thereby, and carrying capacity of the canal sufficient therefor, the water to be delivered from the canal during each and every irrigation season, said amount to be measured at or within one-half mile of the place of intended use in such quantities and at such times as the condition of the soil, crops and weather may determine, but according to such rules and regulations based upon a system of distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from this canal system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part and used by it during the period while it retains the management of said system, and that it shall meet the approval of the State Engineer."

There is an additional distinguishing feature of this provision. *Before this time the contracts had provided for the delivery to the settler of a certain number of acre feet of water. In this contract that provision was eliminated.*

The next contract made was with the Twin Falls-North Side Land & Water Company (p. 380). The numbering of the paragraphs was changed and number nine appears in this as number ten, as it does in the contract in issue. The contract in issue follows in form the North Side contract above mentioned. These contracts show the history of this provision.

The contract involved in the case of *State v. Twin Falls Canal Co.* 21 Ida. 410, a governing case on the questions involved, is in this record (Ex. D. p. 337).

Prior to the making of this form of contract in 1899, water right appropriations had generally been looked upon as giving the appropriator a right to a continuous flow throughout the irrigation season or longer. Contracts and decrees were frequently looked at in the same light. Investigations just prior to this time had been extensively carried on by the Government in regard to the duty of water.

See Bulletin 86, Department of Agriculture.

Numerous reports from special agents throughout the west were made upon this subject.

See report of Irrigation Investigations in 1901.

There had been much criticism of contracts calling for a continuous flow. In Bulletin No. 86 (*Use of Water in Irrigation, Report of Investigations in 1899*), it was stated (p. 20) :

“Where decrees or contracts provide for the delivery of a continuous flow, it is pre-supposed that irrigators use water in this matter. This is not in accord with the best practice. Irrigators do not need water all the time. Few use it half the time. If they are required to pay for a continuous flow, they usually pay for something they do not get and always for what they do not need. The best practice provides for rotation on the part of irrigators in the use of water and the use of a larger volume of water for only a period of the time. Where this occurs, a different unit of measurement (from the inch or cubic foot per second) is desirable because it is not the continuous delivery of a stream of a designated size which is paid for but the total volume furnished during the whole or any part of the irrigation season.

The growing recognition of the fact that a continuous flow of water does not correspond to the needs of irrigators has recently brought into use another unit of volume, the acre foot."

It was further stated (p. 21) :

"Contracts which provide for the delivery of a uniform constant flow are as a rule wasteful of water. They are not therefore to the interests of either ditch companies or the public."

In the rules and regulations of the State Engineer's office issued in 1899, page 119, the State Engineer of Idaho discussed the question of continuous flow. The State Engineer said in regard to this continuous flow (p. 120) :

"When practiced by a multitude of small users it leads directly to extravagant use and unnecessary loss of water * * *. Distribution by rotation is the system based upon the delivery to each user in turn or by rotation with other users from the same canal or main lateral such serviceable irrigating heads as his crops or soil might demand during the seasons of plentiful supply and a proportional part of the total available supply during seasons of scarcity; such proportion being based upon the priorities of the rights of users. This system for the distribution of water is as old as irrigation itself and it is only through its practice that the water supply of any arid region can be given its highest efficiency."

The whole matter of the distribution of water to irrigators is quite extensively discussed in this report (pp. 119 to 125), and the influence of the views of the State Engineer is found embodied in the ninth paragraph of the form of Carey Act State contract prepared by the State Engineer and the Attorney General jointly at that time (pp. 326, 308).

The State Engineer likewise discussed this matter in his biennial report for the years 1899 and 1900, p. 84.

When it came, however, to executing contracts calling for a definite number of acre feet of water, it was found that there was a lack of information upon this subject.

The State Engineer, in his biennial report for 1899 and 1900 (p. 86), says :

"I am free to admit that notwithstanding the two years of study of this question in the Boise Valley, we know but little regarding the actual duty of water. To make observations which would enable one to safely estimate the duty of a given volume of water would require a careful study of the subject extending over years. The general results attained, as shown by the table, indicate, however, that it is possible to attain a very high duty in this valley. From the observations made, I think we may safely estimate that the average depth required for irrigation here will be from two to two and five-tenths acre feet."

As perviously noted, the American Falls contract called for two and one-half acre feet (p. 334) and the Mullins Canal & Reservoir Company for three acre feet (p. 335) under the special circumstances of that project.

Report State Engineer, 1899-1900, p. 75.

When the next contract was drawn, which was one calling for the irrigation of 240,000 acres of land, the provision, as before stated, was omitted. The reasons for the omission of this provision are stated in the affidavit (pp. 311, 312).

Under the Carey Act plan, a water permit for the entire project was to be taken out in exactly the same way as a water permit for a single farm. It was first necessary to determine whether this was sufficient. If it was sufficient, then the only question remaining was the method of distribution among the people using the sup-

ply. The rotation method was considered the most modern and up-to-date, the one which had been found necessary wherever irrigation was extensively practiced.

State v. Twin Falls Canal Co. 21 Ida. 410 (441).

If the water users, however, had the right to demand a certain flow of water, whether needed or not, it might greatly interfere with an effective system of rotation.

It might prevent the shifting of water from place to place, as the best interests of the tract required.

In some respects, the fixing of an amount to be given to a farmer measured in acre feet was as objectionable as the fixing of a continuous flow of an inch or a second foot to any given number of acres. It was expected that practice and experience would show just what could be done by the rotation system and that this plan should be devised by the company building the works which would employ capable engineers for that purpose. The water was to be delivered under rules and regulations which, of course, must be reasonable but only at such times as the condition of the crops required. It was thought that the highest duty of water and the best conservation of the waters of the State would result from this practice.

We think the reason for dropping this provision of the contract with regard to a definite number of acre feet reasonably appears from the fact itself without further explanation. All the contracts following the contract mentioned up to the time of the execution of the contract with the State here in question (p. 54) followed the same plan and omitted any reference to a definite number of acre feet of water to be delivered. It was under these circumstances that the contract in question was drawn.

There was another consideration also. The Reclamation

Act was passed in 1902, before the execution of the contract Exhibit "D" (p. 337) with the Twin Falls Land & Water Company in 1903 above mentioned, this being the contract which first omitted any reference to a definite number of acre feet.

Section 8 of the Reclamation Act provided:

"That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the lands irrigated and beneficial use shall be the basis, the measure and the limit of the right."

In the form of articles of incorporation for water users' associations on reclamation projects, Art. V, Sec. 6, Mill's Irrigation Manual (p. 301), it was provided:

"The amount of water so to be delivered to such owner shall be that proportionate part of all stored and developed water, the storage or development of which is or may be affected by this association, or by means of works under its control, management or direction, or which may become available for distribution by this association from irrigation works built by the National Government during any irrigation season as the number of shares owned by him shall bear to the whole number of valid or subsisting shares of the association and then outstanding to be delivered to and upon said lands at such times during such season as he may direct."

The water right application for lands in private ownership (Form B) provides, in paragraph two thereof, as follows:

"The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to the irrigable acreage of the water supply actually available as determined by the project manager or other proper officer of the United States."

The Department of the Interior issued a series of questions and answers relating to the Reclamation Act and its operation, of which the following questions and answers appear (p. 36) :

“Q. How much water will be furnished for the land?

“A. Such amount as may be available from the works controlled by the United States not to exceed the amount necessary for the proper irrigation of the land. This quantity will be duly announced for each project when the Secretary of the Interior gives the public notice under Section 4 of the Act.

“Q. What assurance has he of a sufficient supply?

“A. The water users' association is required to limit the land represented by its shares to the area which the Government has determined can be cultivated to the highest efficiency.”

Questions and answers will be found as follows in the pamphlet containing “Information Compiled by the United States Reclamation Service, January 1st, 1910, for the Payette-Boise Irrigation Project” (p. 11) :

“Q. How much water will be furnished for the land?

“A. Such amount as may be available from the works controlled by the United States not to exceed the amount necessary for the proper irrigation of the land.”

The plan of operation under the Carey Act is much the same as that adopted under the Reclamation Act. In one case, the question of water supply and the feasibility of the works is presented to the State and National authorities. In the other, to the National authorities. In both cases, the amount of the water supply to which a person is entitled is a proportionate part of the entire supply for the project.

A canal system on a project so large as this is made up

of many miles of canals of varying sizes. To present the detailed specifications of these canals would be an unnecessary labor. The thing to be considered is whether or not the canal will carry sufficient water and, therefore, it is most convenient to describe the canal as a canal having a size sufficient to carry a certain described amount of water.

Likewise with the reservoir. In order to determine its capacity, very extensive surveys are necessary and complicated computations. The specifications in regard to the dimensions of the reservoir are unnecessary provided it has a certain size; therefore, it is most convenient to describe a reservoir by the amount of water that it may hold.

There is another important matter in irrigation practice, and that is the "head" of water that is to be carried in the canal system.

State v. Twin Falls Canal Co. 21 Ida. 410 (437).

The size of the canals governs the "head" that can be delivered through them.

The water supply for the entire tract having been determined to be sufficient, the head of water to be carried having been provided for, the next thing is to determine the method of distribution, whether by continuous flow or by rotation. These matters are all provided for in the manner indicated in the contract in question (p. 42).

The size of the reservoir is provided, as follows (p. 44) :

"The reservoir formed by the dam will have a surface area of over 3,000 acres, an available capacity of 180,000 acre feet and will extend southward from the dam a distance of approximately twelve miles."

The contract also further states as follows (p. 48) :

"And it is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to

provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, *has been determined to be sufficient to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated.*"

This is a description of the size of the reservoir and a statement that a water supply with the aid of this dam had been predetermined to be sufficient to furnish 2.75 acre feet of water per acre. This is the only place in the contract where the amount of 2.75 acre feet of water per acre is mentioned.

The size of the tunnels and canals is likewise specified by their carrying capacity. The main canal was to have a capacity of 1,000 second feet, which was likewise the capacity of the tunnels (p. 45).

It was further stated (p. 48) :

"And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of .01 of a second foot per acre for each acre of land to be irrigated."

It was further provided (p. 50) that each of the shares should

"represent a carrying capacity in said canal sufficient to deliver water at the rate of .01 of one cubic foot of water per acre per second of time * * *."

And it was also provided that (bottom of page 50) :

"said irrigation system, however, is to be built in accordance with the plans heretofore filed with the Board which system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned."

It will thus be seen that the carrying capacity of the canals was predetermined; also that the capacity in re-

spect to the reservoir system had likewise been predetermined.

Paragraph ten of the contract (p. 54) provided as follows:

"The certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests to be represented in said system, to wit, a water right of .01 of a cubic foot per second for each acre of land irrigated as provided in paragraphs IV and VIII of this contract, and a proportionate interest in the said canal and irrigation works based upon the number of shares ultimately sold therein."

In the contract which was given to the settler, and which was signed by him, a copy of the stock certificate was incorporated (p. 64), and reads as follows:

"..... Shares19....

"This is to certify is the owner of shares of the capital stock of the Salmon River Canal Company, Limited.

"This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:, in accordance with the terms of the contract between the State of Idaho and the Twin Falls-Salmon River Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls-Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said company and the State of Idaho."

In regard to this stock certificate, we say this—we are entirely willing that the owner thereof should receive .01 of a cubic foot of water per second of time for his land; that is a description of the head of water he is to receive. It is well settled that water for irrigation purposes is not needed all of the time.

Bulletin 86, Department of Agriculture, p. 20.
Report State Engineer, Idaho, 1899-1900, p. 84.
Hufford v. Dye, 162 Cal. 147.

How frequently shall he receive water?

The certificate was made in accordance with and in conformity with the contract between the State and the Company and refers to it. The contract between the State and the Company (p. 54) provides what the certificate shall contain, and furthermore provides in the same section that water shall be delivered,

“in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations based upon a system of distribution of the water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from the said canal system.”

This provision of the contract answers that question.

But who is to devise the system of distribution?

That is also answered by the same section of the contract (p. 55), which says:

“It is agreed that said system of distribution by rotation shall be devised by the party of the second part and used by the Salmon River Canal Company, Limited, in case the necessity arises during the period while it retains the management of the Salmon River Canal Company, Ltd.”

It goes without saying that the system must be a reasonable one and we may add here that we have no desire to establish any other. Our only security for our money is the lien upon the land to be reclaimed. If it is not successfully reclaimed, our security will be worthless. Unreasonable regulations or an impracticable plan would be of no value to us. It was expected that the plan would

be devised by able engineers as the result of actual experience and practice on the tract

The next question that may be asked is:

What is the total amount of water to be delivered?

The answer is that the statute provided that the interest of the settlers should be proportionate in the common supply; that a water permit of 1,500 second feet for the irrigation of 150,000 acres, or one second foot for every 100 acres, was taken out for the project; that it was predetermined that this amount was sufficient, that this amount existed, and that the settler's interest as defined by the statute and the contract was a proportionate interest therein. It was never intended that a continuous flow method should be adopted.

It is our contention that we are prepared to deliver a head of water of .01 of a second foot and there is no dispute on that point, the size of the ditches being sufficient.

It is also our contention that we are able to deliver this frequently enough, under the regulations that we are authorized to make, to produce satisfactory, practical, agricultural results upon the reduced acreage of the project.

It may be noted that the contract provided that the rotation system should only be used

"in case the necessity arises during the period while it (the Construction Company) retains the management of the Salmon River Canal Company, Limited, (the Operating Company)."

This provision was inserted in order that it might not be obligatory upon the Construction Company to devise the rotation system and put it in use unless the conditions required it, as such a system would call for additional ditch-riders, more care in the measurements of the supply and greater expense.

It was unnecessary also for the contract to provide that the rotation system must be used in perpetuity. It was considered sufficient if this system was established and put in use in the early stages of the project. The settlers, of course, after taking over the project, would be entitled to operate it as they pleased.

We contend that under the provisions of the contract we are only obliged to deliver such an amount of water as may be necessary according to the condition of the crops, and that for this reason, as well as those heretofore urged, the question as to the sufficiency of the water supply which was put in issue by the pleadings must be one of the matters necessarily determined by the Court.

There was another feature of the contract. It was not drawn without what were supposed to be safeguards to the settler. Fifteen hundred second feet of water was appropriated for 150,000 acres of land (p. 47), or, in other words, an allotment of one second foot for every 100 acres. One share of stock in the operating company was to be issued for each acre of land (p. 53) or a total of 150,000 shares.

Considering, however, that it might be possible that the canals would not be built to their full capacity, it was provided:

"In no case shall water rights or shares be dedicated to any lands before mentioned, or sold beyond the *carrying capacity* of the canal."

It was also stated in the contract that the carrying capacity specified in the contract had been determined to be sufficient (bottom page 50). A permit for 1,500 second feet having been taken out and the supply having been found to be sufficient, it was further provided in the contract that there should be no sales in excess of the amount

represented by the permit, the provision being as follows (p. 52) :

"In no case shall water rights or shares be dedicated to any lands before mentioned or sold * * * in excess of the appropriation of the water therefor."

The words "appropriation of water" in this clause refer to the appropriation represented by the permit taken out for the project (p. 47).

At the time of the making of these contracts no question as to water supply arose. That had been examined into and settled. The contracts with the settlers were practically all made in the month of June, 1908, before the record of the water supply of subsequent years had been gathered. This was not a provision limiting sales to the amount of water thereafter found to exist, because the State Engineer had just reported that the supply was sufficient.

Let us consider now the views of the contract taken by the Court:

The Court construes the contract to promise to the settler unequivocally a certain definite amount of water and then proceeds to find that amount is 2.75 acre feet per acre.

Let us see how the Court arrives at the conclusion that there is a promise in this contract to deliver a certain specific amount of water rather than a proportionate interest in the entire water supply, which had been predetermined to be sufficient.

In the first place, the Court says that it was highly improbable that the settlers would have signed a contract to pay \$40.00 an acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system, and the Court further says:

"Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the company would give * * * no assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole and no guaranteed limit upon the number of acres for which water rights would be sold?"

In answering this, let us take the situation as it was. At the time the water supply had been examined into and approved by the State Engineer, the plan had been approved by the Department of the Interior and the contract with the State was made on the 30th day of April, 1908. The contracts in question were made in the month of June, 1908. There was then no subsequent experience to show that the water supply was in any respect insufficient. There was no occasion for the Company to make any representations about the matter because the State, in the exercise of its authority, had determined the question, and, furthermore, the Company made no such representations.

The plaintiffs introduced their Exhibit No. 17 (p. 147), purporting to be the Company's advertisement in regard to these lands, and while it appears upon its face (p. 147) that it was not issued until after 70,000 acres were filed upon in the month of June, 1908, and while, as a matter of fact, it was the advertisement of a gentleman who was pushing a town which was named after him (p. 155) and was not really the advertisement of the Company, still, we may take this as it is in the record as an illustration of the point and it will be found that the inducing clause (p. 148) of the settlement of these lands was that the

"State Land Board supervises the entire construction of the irrigation system and dams. The Land Board advises and looks after the interests of the settlers."

And the claim as to the water supply (p. 152) was no more extravagant than the statement of the State Engineer in his report upon the project (p. 389).

It was State supervision and approval that induced the people to enter these lands. The situation was the same as on reclamation projects. There was no occasion for the Company to make any promises, and, contrary to the view taken by the Court, there was a guaranteed limit upon the number of acres for which water rights would be sold.

As previously stated, a water permit was taken out for 150,000 acres. This was the original limit, which was afterwards reduced as heretofore stated.

The Court, in its opinion, called attention to the representation (p. 283), but, as previously stated, these representations were little less than the repetition of the report of the State Engineer.

Next, the Court goes to the consideration of the contracts and particularly calls attention to the so-called settlers' contracts (Exhibit C, p. 62). The Court says that

“a printed form was prepared by the Company and offered to the public” (p. 284).

And further on, invokes the rule that

“a printed form of agreement will be construed most strongly against the party by whom it is prepared” (p. 290).

There is no testimony in the record to sustain this. No doubt the original draft of this contract was prepared by the Company, but the contract as it stands was the form of contract that was approved by the State. This was well understood by both sides and the opposing counsel stated

“the settler's contract was submitted to the State authorities and was there passed upon” (p. 259).

There was a reason for this. The State statute provided that land entries could not be made on this tract unless a copy of this contract was presented with the entry (Sec. 1626, R. C.). The rule invoked by the Court, therefore, in regard to the use of a printed form was without foundation.

The Court next considers the terms of the stock certificate which appeared in the printed form of settler's contract (p. 284) and concludes (p. 286) that the import of the instrument standing alone, as it would be understood by an intelligent layman, is not open to debate.

"It is a contract for the sale of a specific water right of .01 of a second foot per acre for each acre of land described and as an incident thereto, a proportionate interest in the irrigation system."

The Court further says:

"the clear purport of the entire instrument is the sale of the water right and that is undoubtedly the sense in which the company expected it would be understood and in which it was understood by the settler."

The Court further says that this

"would impart a right in the owner at any time he had need and so long as he had need to divert and use a stream of the magnitude thus described. The question of the quantity of water in cubical measure would rarely arise for no one would be interested in calling it up."

We may well admit that it would impart a right in the owner at any time he had need "*and so long as he had need*" to divert and use a stream of the magnitude described. That is exactly the point—who was to decide the question as to how long he needed it? We answer that under the terms of the contract that this question of the rotation system and its plan of operation was to be de-

cided by the Company in the first instance, with the understanding, of course, that the plan of rotation must be reasonable (p. 55). With this understanding, the description of .01 of a second foot per acre is the description merely of the head of water that will be used when such use takes place. The question of the quantity of water in cubical measure is of vital interest to the project and the company conducting it. The difference between the careful and economical management of the water supply and the old-time careless method of continuous flow means a difference of many thousands of acres. Furthermore, in construing this provision in the stock certificate, it must be remembered that 150,000 acres of land were to be watered with 1,500 second feet of water, or, in other words, that there was an allotment of one second foot of water for every 100 acres of land, and this, upon the face of the papers, was the proportionate interest of the settlers in the project. This supply, however, not to be delivered continuously but as needed. It was known, of course, that this supply did not always exist in the stream. The State Engineer thought that the normal supply would be sufficient up to about the month of July (p. 390) and for this reason the building of the reservoir was necessary.

The amount of the water supply to be furnished to each settler was not contractual—it was statutory. As before stated, the permit to appropriate water must be taken out for the project. The sufficiency of the supply represented by this permit must be passed upon by the State Engineer (Sec. 1618, R. C.). If he disapproves, the project must be dropped (Sec. 1619, R. C.). If not, it is then up for approval by the Land Board. The permit is taken out for the irrigation of a definite area of land and not, as might be implied from the decision of the Court, for an indefinite area, and by statute, the interest of the settler

in this water supply is a proportionate interest (Sec. 1615, R. C.), the statute providing

“said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.”

These “rights and franchises” are the water rights.

State v. Twin Falls Canal Co. 21 Ida. 410 (423).

Land opening and the making of contracts follow immediately after the making of the State contract. In this case, only a month apart, and the contracts were made in the light of the then existing circumstances instead of the conditions and circumstances which surround the project today.

After arriving at the conclusion that the contracts called for a certain definite amount of water, the Court then proceeds to discuss the question as to what this amount is and holds that:

“A right was contemplated sufficient to enable the settler to receive water at the rate of .01 of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be 2.75 acre feet and this view I am inclined to adopt.”

We thought that we were entitled to deliver the .01 of a second foot per acre under the rotation system as provided in the State contract, but the Court here holds that we are to deliver water

“at the rate of .01 of a second foot per acre *continuously* during the season of actual irrigation needs.”

There is nothing in the contract whatever to justify the word “continuously.” It is in flat contradiction of the express terms of the contract providing for a rotation system.

The Court then goes on to find that the amount is 2.75 acre feet.

The only place in any of the contracts where that amount is referred to is in the State contract (p. 48), where the language used is as follows:

"It is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water which amount, in addition to the normal flow of said stream during the irrigation period *has been determined to be sufficient* to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated."

Two and three-fourths acre feet for 150,000 acres would call for a total flow of 412,500 acre feet. The State Engineer estimated that

"over 400,000 acre feet of water can be impounded annually for use on the 150,000 acres of land" (p. 390).

Four hundred thousand acre feet for 150,000 acres of land would be 2.66 acre feet for each acre, but it must be remembered in each of these instances that the State Engineer is speaking of the run-off of the stream, or, in other words, the amount to be measured into the reservoir.

In making water appropriations in Idaho, the point of measurement is at the point of diversion from the common supply, the user to stand the transportation losses.

Bennett v. Nourse, 22 Ida. 249 (254).

In this case the entire river is taken in at the head of the reservoir. On an ordinary project, the place of measurement would be the point of diversion from the stream.

State v. Twin Falls Canal Co. 21 Ida. 410.

Here it should be at the head of the reservoir.

The amount which the project was entitled to use from the stream was fixed by the permit taken out for the project (p. 47) at 1,500 second feet. In order that the farmers might secure their proportionate parts of this water, it was necessary to have a place of measurement in order to determine their rights among themselves, and for this purpose it was provided (top page 55) :

“Water shall be measured to users from the place of diversion at the main laterals of such irrigation system.”

There was a definition in the contract of a main lateral (p. 57). The Court in the decree provides that the company contracted to provide water,

“at the rate of 2.75 acre feet per acre *measured at the point of delivery from the system in the consumers' laterals.*”

This is not by many miles the point specified in the contract where the proportionate share of the settlers shall be measured to him. It may be here stated in explanation that under the place of measurement in the contract, it was expected that the settlers would organize among themselves for the delivery of water on laterals. It was thought at the time that this would be the most satisfactory method and would save the settlers something in the way of operating expenses; hence, the plan of measurement of the water supply on a lateral system in gross instead of to the individual settler as called for by the decree of the Court.

One of the main points that seems to be urged by the lower court in the construction of the contract adopted was that it was agreed that the Company might sell shares

“to the extent of the capacity of the irrigation works *and to the extent of the rights to which it is entitled*” (p. 289).

This clause must be understood in the light of the conditions that surrounded the parties at the time it was made. The State Engineer had a short time previously investigated the matter and held that the water supply was sufficient. The Government had approved the plan and the contract had been made with the State. Within sixty days thereafter the contracts in question with the settlers were made. This contract was not made with the idea that the water supply was going to prove insufficient. It had just been approved as entirely satisfactory; therefore, this clause must be now taken to mean exactly what it meant at the time, that shares would not be sold beyond the capacity of the works which had been agreed to be built and that shares would not be sold beyond the limits of the water appropriation of 1,500 second feet, which had just been taken out and approved and which represented the right to which the project was entitled. These parties entered into these contracts with the idea that all question of the failure of the water supply had been eliminated, and, therefore, it was only necessary to provide the safeguards heretofore mentioned.

In commenting upon the water supply to be furnished under this contract, the Court further says:

"Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as .01 of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally regarded as being necessary and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot."

It is quite true that in the early history of the State an inch to the acre, or one-fiftieth of a second foot, was a common standard. The Carey Act has been in operation in Idaho, however, for nearly fifteen years and many con-

tracts have been made. There may be one or two instances in the early Carey Act contracts where a ditch capacity of one-seventieth of a second foot was provided for, but the first contract of importance made, to wit, the American Falls contract, called for a delivery of only two and one-half acre feet of water (p. 334).

The Twin Falls contract, made January 2nd, 1903, called for a ditch capacity of one-eightieth of a second foot, the water to be delivered under a rotation system (p. 350), and no Carey Act contract made since 1902 has provided for a larger quantity of water. On the contrary, there has been a constant reduction.

The Payette-Boise Reclamation Project, the largest in the State and where there is greater need of water than on the project in question, was many years ago based on a duty of two and one-half acre feet.

The contract on the Third Segregation of the Twin Falls North Side Land and Water Company is in substantially the same terms as the contract here in question. It was made in January, 1909, and the succeeding contract upon the Oakley Project, situated only twenty-five or thirty miles to the east (see defendant's Exhibit 19, p. 68, Vol. 2, tr.) called for a maximum duty of one and one-half acre feet, and it appears in the record that the conditions surrounding that project are the same as surround this (Vol. II, p. 23).

When the Court says

“that the duty was more or less frequently increased to one-eightieth of a second foot,”

an erroneous impression is conveyed. The day of the inch to the acre passed many years ago. Conditions differ in different parts of Idaho. In eastern Idaho there are large streams and an abundant use of water and little

care used in irrigation. In southern and southwestern Idaho a much different condition prevails.

The conditions which the Judge of the lower court describes and which might apply to a district in eastern Idaho, have no general application to irrigation conditions in the State. Furthermore, it is a confusion of terms to say that a duty of .01 of a second foot to the acre is necessarily a high duty. It depends upon the manner of delivery and the total amount delivered. When the rotation system was first devised it was deemed necessary to have a large head of water in order to get over the land quickly and efficiently. It was recognized that a large head was a vital item in irrigation practice. It was also recognized that water need not be used all the time; hence the desirability of having one settler use water while the other was not doing so in order that the entire supply might be fully utilized. Later irrigation methods, however, largely did away with the necessity for a large head. The corrugation method in common use in the Twin Falls District does not require an abnormally large head of water.

Widtsoe's Principles of Irrigation Practice, p. 207
(211).

For this reason, the head of water has been cut down from what was formerly deemed necessary. The total amount of water, however, applied to the land depends in part only upon the head of water furnished, the important feature being as to the length of time the head is delivered. Even in the days of an inch to the acre, this head of water was not as a usual thing constantly delivered and the real amount of water put onto the land was practically never measured.

The Relief Granted.

The original estimate of the State Engineer was to the effect that there was 400,000 acre feet of water for the reclamation of 150,000 acres of land; or in other words, that there were 2.66 acre feet per acre, but this was not the amount that would be delivered at the farm. The report said:

“400,000 acre feet of water can be impounded annually.”

This would be the amount running into the reservoir. According to the measurements made by the Company the average annual flow is slightly in excess of 130,000 acre feet (p. 192). Some measurements made by the Geological Survey show 127,000 acre feet (p. 178). The difference is explained by the witness Newell (pp. 213, 205) on the ground that the Geological Survey's measurements were taken from a much smaller number of measurements than the Company's records. If the ratio of 2.66 acre feet is to be maintained, then the project would be cut to 48,750 acres. If the unit of 2.75 acre feet is to be taken, then the project would be cut to 47,270 acres, but if, as claimed in the bill and as decreed by the Court, the 2.75 acre feet are not to be measured at the intake into the reservoir nor at the point of diversion into the canal therefrom, nor at the point of diversion from the main laterals as mentioned in the contract (p. 55), but are to be measured at the farmer's headgate, then the losses by seepage and evaporation in the canal and reservoir must be deducted. These losses in the beginning are considerable, as they are on all new irrigation systems. The losses on this system are shown by the diagrams in evidence (pp. 195, 197). The loss in the canal system is likewise shown in detail (p. 201). It is not claimed that these are more than

the normal or usual losses in new works which, however, constantly grow less as the records show. What acreage can be covered with the water supply of 130,000 acre feet impounded in the reservoir by measuring it out in quantities of 2.75 acre feet at the farmer's headgate is problematical and this is recognized by the Court in the opinion and the decree. It is well recognized that the amount of land that can be irrigated from a given water supply on any project tends constantly to increase.

It is stated in the report of the State Engineer of Wyoming for 1895-96, p. 42:

"The same volume of water will suffice to irrigate two or three times as much land after it has been cultivated a few years. It must also be borne in mind that this maximum volume is needed during only a limited portion of the year, not in any case to exceed two months, and in a great majority of cases, it will not exceed thirty days. This increasing duty of water is not the result of care and economy on the part of the irrigator but is the inevitable and uniform working of natural forces. * * * The significance of the increased duty of water which comes with its continued use is too important to be disregarded. The generally accepted mean duty of water in Colorado in the beginning of irrigation was one cubic foot per second for each 54 acres land. It now varies from two to six times this area. If, therefore, we are to say that an appropriator is entitled to a definite volume of water and to the continuous flow of that volume and disregard the greater service which this will render as irrigation becomes better understood and the subsoil saturated, we are conferring on every early appropriation an expanding right and inflicting a corresponding loss on the public."

The Court has not yet found the acreage that can be covered and has left the matter open for further testimony on the point of canal and reservoir losses.

We may gain an idea of the view of the duty of water taken by the plaintiffs from the pleadings. It is set up

that the project must be cut to 30,000 acres (p. 20), and it is also alleged that we have not more than 50,000 acre feet of water available for delivery to the farmer at his headgate (p. 17); in other words, a duty of 1.66 acre feet is indicated.

If this unit is used and an allowance of 30,000 acre feet made for losses in the entire system, then the 100,000 acre feet remaining would serve 60,000 acres, a larger area than the project as it stands at present.

At the hearing we sought to show that upon an adjoining project, known as the Oakley Project, twenty-five or thirty miles to the east, that the contract with the State provided for a maximum duty of 1.50 acre feet; that this contract was made very shortly after the making of the contract in question and that the project was in successful operation. For this purpose we brought evidence to show that the conditions on the two tracts were similar (Vol. 2, p. 23), the amount of water that had been delivered to settlers (Vol. 2, pp. 19 to 23) and to show the crops raised by these settlers (Vol. 2, pp. 7, 18). We thought that practical results on the adjoining projects would have an important bearing upon the question before the Court.

Our claim was that 1.50 acre feet of water during the irrigation season, the maximum amount provided upon the adjoining project, was sufficient for this project. The pleadings claim 1.66 acre feet, while the judgment of the Court gives 2.75 acre feet per acre.

If we allow 15,000 acre feet for loss in the reservoir and 15,000 acre feet for loss in the canal system, we would then have 100,000 acre feet for delivery, and on the basis of 2.75 acre feet at the farmer's headgate, this would serve 36,330 acres.

It is the invariable rule in the State of Idaho that water

appropriations are to be measured from the place of diversion from the common supply.

State v. Twin Falls Canal Co. 21 Ida. 410.

If we apply that rule to this case, the place of measurement would be the intake of the reservoir, that being the place where we began the use of the water and deprive other people of it. If the acreage is going to be cut down, we insist that the cut should be made upon the basis of the original apportionment; that is to say, upon the basis of 2.66 acre feet measured at the intake to the reservoir and not at the farmer's headgate as indicated by the Court. But if measurement is to be made at the farmers' headgate then the unit of 1.66 acre feet should be used as indicated in the pleadings.

It was the purpose and object of the statute and contract to give to all the settlers the same kind of right, each one sharing in proportion to the acres owned. It was specially stated in the contract,

"It being understood, however, that priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system" (p. 49).

Yet in the face of this provision of the statute the Court was asked to fix priority between settlers (pp. 27, 40); and the Court has actually started out on such a course by providing that 2.75 acre feet of water must be measured at the points of delivery from the system into the consumer's lateral and by suggesting in the opinion that the area may be reduced by negotiation (p. 306).

What reduction we must make under the opinion and

decree of the Court we do not yet know, further than that it must be very great. If we are to follow the decree of the Court, then we must give to the settlers, so far as possible, 2.75 acre feet of water for their holdings and the remaining part of the settlers must be left out. Such a course would have no legal basis in the statute or the contract. The reduction, if any is to be made, must necessarily be made by a proportionate cut in the holdings of each entryman.

But it is our contention that no cut of any kind is necessary. Taking the available water supply at 130,000 acre feet and the loss in the reservoir system at 15,000 acre feet and in the canal system at another 15,000 acre feet, we would have available for delivery to the farmer at his headgate 100,000 acre feet of water.

The crops on projects in Idaho are divided into two general classes: alfalfa and other crops requiring a similar water supply, and grain and other crops calling for the same amount of water. The acreage on Idaho projects is about equally divided between these two classes of crops. Generally, three crops of alfalfa are raised in southern Idaho. On some of the projects, at this elevation, however, only two crops and a pasture crop are raised. Where three crops of alfalfa are raised four irrigations are found to be sufficient.

Six inches of water applied at each irrigation is a substantial and sufficient quantity, as shown by the Idaho Experiment Stations.

Bulletin 58, Extension Department, State University, p. 11.

Bulletin 78, Extension Department, State University.

Widtsøe Principles of Irrigation Practice, (pp. 23, 277).

Farmers' Bulletin 263, Department of Agriculture,
(p. 38).

This calls for the irrigation of four acres per day of twenty-four hours with a head of a second foot of water. A little less than this is commonly irrigated at the first irrigation and a larger acreage at subsequent irrigations, a reasonable average being four acres.

Four applications of six inches of water would call for two acre feet on one-half of the project. Grain crops are ordinarily irrigated twice. With fall grain, only one irrigation is necessary. Occasionally, it may be best to irrigate lightly three times. The average application of water, however, would not exceed a six inch application in two irrigations or one acre foot of water. The projects being half in alfalfa and crops calling for a similar water supply, and half in grain or other crops requiring a like amount of water, the average requirement for the entire tract would be 1.5 acre feet or on this project, for the application of 86,000 acre feet of water.

But there are other items to be considered in connection with this. On thickly settled projects, eight to ten per cent of the land is not in cultivation (Report of the State Engineer of Idaho, 1913-14 (p. 27), and engineers ordinarily estimate a still greater amount.

And there is still another consideration. Some fifteen to twenty-five per cent of the water applied to an irrigated farm ordinarily runs off its surface and where, as in this case, this drainage is largely utilized again, it is a factor practically increasing the water supply. If it is said that our estimates in this respect are inaccurate, our reply is that they are in actual operation and have been successfully worked out on the Oakley Project, twenty-five or thirty miles to the east, under the same general conditions.

We say that the plan of organization of Carey Act Projects provides that we should occupy the position of a construction company only. That for convenience in attaching the water to the project, we were required by statute to take out a permit covering the project; that the sufficiency of the supply represented by this permit was passed upon in advance by the State Engineer and fully approved by him; that the amount of water that the settler is entitled to is a matter of statutory regulation, to wit, a proportionate interest and not a matter of contract, the proportionate interest being a proportionate interest in the water supply represented by the permit.

We are not "selling water rights" and are paid only for construction work. Under these circumstances, the Court could not render a judgment against us. This is our legal right.

Our legal right brings us no money, however, unless the irrigation project is a practical success. We are in the same position as the settler. We must get our money from the settler and he must get the money out of the land. The project must be organized in such a way as to produce this result, otherwise, whatever legal relief we are entitled to will be of no avail.

We have set up in the pleadings, in addition to the matters heretofore mentioned, further matter to the effect that if the water supply claimed by the settlers is furnished to them, that it will result in injury to the project. It is now a matter of experience that irrigation projects too frequently result in drainage projects. The result on the Twin Falls Project, which immediately adjoins the Salmon River Project on the north (see map, p. 68) shows in a surprising way the necessity for the careful use of water. Mr. Sloan, the expert of the Department of

Agriculture, gives an outline of the work on this project. (Vol. II 63-76).

If the settler presented the matter contained in this bill as a defense to a suit brought to foreclose the lien of the water contract, and if it appeared that we had actually made a contract to deliver him 2.75 acre feet of water per acre and that we could not deliver so great an amount, then taking into consideration that the only right to water is a right to its use in such a quantity as is reasonably required, the rule would be that the settler could only have a deduction from the amount to be paid equivalent to the harm which he has suffered; in other words, if we had contracted to give him 2.75 acre feet of water and were not able to give him so great an amount, still if this quantity was reasonably sufficient for his purposes, then the deduction made would be for nominal damages only. Apparently it was exactly this rule that the settler wished to get away from. He did not wish to have the deduction measured by the injury which he had suffered (pp. 276-7).

In this form of action he seeks a measure of relief and has been given it by the Court which he could not otherwise obtain. The bill did not state grounds for equitable intervention and the relief given is not along equitable lines.

If there is a reduction in acreage it must follow the statute and contract and be made proportionately; any other method would be inequitable, and not to the interest of the settlers.

Refusal to Follow State Decisions.

The case of State v. Twin Falls Canal Co. 21 Ida. 410, and the case following re-affirming it of State v. Twin Falls Canal Co. 26 Ida. 728, practically cover all of the features of the present case, and are reinforced by the

cases of Idaho Irrigation Co. v. Pew, 26 Ida. 272, and the Idaho Irrigation Co. v. Lincoln County, 152 Pac. 1058.

The lower court refused to follow the principles governing Carey Act contracts which are laid down in these cases. These were cases involving the construction of the State statutes and the contracts made under them and should have been followed by the lower court.

In conclusion, we say:

1. We are a construction company only, receiving compensation for work done. We have performed the work and are entitled to our compensation.

2. As required by statute, a water permit was taken out for the entire project in the same way as it is taken out for a single farm. The State determined that this supply was sufficient. This permit determined the amount of water that might be diverted for the entire tract. The portion of this supply that the settler was entitled to was a matter of statutory regulation and not a matter of contract, the statute giving the settler a proportionate part of the entire supply.

3. That taking the terms of the contract as they appear, a settler is entitled to a water right or head of .01 of a second foot of water for each acre of land, this being the proportionate allotment made, to be delivered, however, under a rotation system as the needs of the crops require; that we were to devise this system; that we have the right to do so; that we have the right to deliver the water under a rotation system under reasonable rules and regulations; that there is no promise that the total amount delivered in any season should equal 2.75 acre feet. It need only be such amount as is necessary.

4. That if the individual settlers made defenses to foreclosure suits on the basis of the facts stated in this bill,

that the measure of relief granted would only be to the extent to which the settler was harmed ; that the measure of relief sought here and the measure of relief granted by the Court is in excess of this.

5. That under the pleadings the question of the sufficiency of the water supply was one of fact.

6. That the Court refused to follow the rule of the State Court construing State statutes and contracts made under them.

We ask the reversal of the judgment that we may have an opportunity for the benefit of all to put this project on a firm foundation and establish such a reasonable and just use of water as will bring about this result.

Respectfully submitted,

SAMUEL H. HAYS,
*Solicitor for Twin Falls-Salmon River
Land & Water Company.*

APPENDIX.

THE CAREY ACT.

Sec. 4, Act August 1894, 28 Stat. 372:

That to aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation, and sale thereof in small tracts to actual settlers, the Secretary of the Interior, with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State, to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the act entitled "An act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant, and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed, occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this act, as thoroughly as is required of citizens who may enter under the said desert-land law.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated, which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan if irrigation shall not be approved. That any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement

and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation, and settlement.

As fast as any State may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: *Provided*. That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. That to enable the Secretary of the Interior to examine any of the lands that may be selected under the provisions of this section, there is hereby appropriated out of any moneys in the Treasury not otherwise appropriated one thousand dollars.

Amendment of June 11, 1896, 29 Stat. 413, under "Surveying Public Lands:—"

That under any law heretofore or hereafter enacted by any State providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an act entitled "An act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: *Provided*. That in no event, in no contingency, and under no circumstances shall the United States be in

any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

Amendment of Mch. 3, 1901, 31 Stat. 1133, Sec. 3, provided the ten-year period of the earlier act should be extended and run from the approval of the plans.

See also Joint Resolution 51, May 25, 1908, 35 Stat. 577, giving an additional grant.

State Statute Relating to Carey Act.

"Sec. 1614. The Register shall have the custody of the records of the board; and shall receive and file all proposals for the construction of irrigation works to reclaim lands selected under the provisions of this chapter; keep for public inspection maps or plats, on a scale of two inches to the mile, of all lands selected; receive entries of settlers on these lands, and hear or receive the final proof of their reclamation; and do any and all work required by the board in carrying out the provisions of this chapter. He shall have authority to administer oaths whenever necessary in the performance of his duties as secretary of the board."

"Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the board a request for the selection, on behalf of the State, by the board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared in accordance with the rules of the board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached there-

to. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the board to determine his or their financial ability to carry out the proposed undertaking."

"Sec. 1616. A certified check for a sum not less than two hundred and fifty dollars, not more than two thousand five hundred dollars, as may be determined by the rules of the board, shall accompany each request and proposal, the same to be held as a guarantee of the execution of the contract with the State, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of this chapter."

"Sec. 1617. The person, company of persons, association or incorporated company making application to the board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the board. This application for a permit shall be of a form prescribed by the State Engineer and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior."

"Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted to the State Engineer, who shall examine the same and make a written report to the board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters

of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or examination as will enable him to report intelligently thereon to the board."

"Sec. 1619. On receipt of the report of the State Engineer the Register shall place the request and proposal with the Engineer's report thereon before the board for its consideration. In case of approval the board shall instruct the Register to file in the local land office a request for the withdrawal of the land described in said proposal. No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the board."

"Ses. 1620. In case the State Engineer shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the board, the said board shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty days in which to submit a satis-

factory proposal; but the board may, at its discretion, extend the time to six months."

"Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the board to enter into a contract with the parties submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State."

"Sec. 1622. No contract shall be made by the board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from the date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the board, will forfeit to the State, all rights under said contract."

Section 1623 relates to forfeiture of the contract on account of the default of the contractor in building the works.

Section 1624 provides that the State shall not be financially responsible for the work.

"Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State Capital, for a period of four weeks, to give notice that said land, or any part thereof as the board in its discretion may deem is for the best in-

terest of the State, is open for settlement, the price for which said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works."

Section 1626 provides that any citizen of the United States or any person having declared his intention to become such (excepting married women) over the age of twenty-one years, may make land entries not exceeding 160 acres and that

"such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has been authorized by the board to furnish water for the reclamation of said land."

Section 1628 provides:

"Within one year after any person, company or persons, association or incorporated company, authorized to construct irrigation works under the provisions of this chapter, shall have notified the settlers under such works that they are prepared to furnish water under the terms of their contract with the State, the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the register of the State Board of Land Commissioners, a judge or clerk of any court of record within the State, or commissioners to be designated by the board, within the State, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitled him to a water right for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract."

The remainder of the section relates to fees, etc., and also provides that when the works are completed in accordance with the Act of Congress that the application for patent shall be made.

"Section 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon such land. It shall be the duty of the board, under the signature of the president at-

tested by its Register, to issue a patent to said lands from the State to the settler.

"The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passed from the United States to the State. Any person, company or association, furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water rights; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate."

"Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder at the front door of the court house of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. At such sale no person, company or persons, association or incorporated company, owning and holding any lien, shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right."

The remainder of the section relates to the time of redemption, certificate of sale, etc.

United States
Circuit Court of Appeals
For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND & WATER
COMPANY, a corporation, SALMON RIVER
CANAL COMPANY, LIMITED, a corporation,
COMMONWEALTH TRUST COMPANY OF
PITTSBURGH, TRUSTEE, and A. C. ROBIN-
SON, ~~Appellants~~ Appellants,

VS.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
W. BEAUCHAMP, CARL WASHBURN and
HAROLD M. SIMS, in their own behalf and in
behalf of all persons similarly situated with them,
Appellees.

**Brief of Appellants Commonwealth Trust Company of
Pittsburgh, Trustee, and A. C. Robinson.**

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

RICHARDS & HAGA,
McKEEN F. MORROW,
Solicitors for Commonwealth
Trust Company of Pittsburgh,
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STATEMENT OF THE CASE.

This appeal is from an interlocutory decree of a most extraordinary character. While it is in form an injunction, it is in fact a decree for specific performance and requires the performance of an impossible act—the furnishing of water in excess of the

available supply—under the penalty that, until this has been done, nothing can be collected or recovered for the water that has heretofore been made available for and used by the farmers through a completed irrigation system constructed at an expense of upwards of \$3,500,000.

The theory upon which the decree is based finds no precedent in reported cases, and no authority is cited by the learned District Judge in his decision covering twenty-eight pages of the printed record (Rec. pp. 279-307).

This brief is intended only as supplementary to the brief that will be filed by the appellant, Twin Falls Salmon River Land and Water Company, hereinafter called simply the Land and Water Company, and we shall confine our statement and argument to such facts and questions of law as pertain directly to the rights of the appellants in whose behalf this brief is filed.

The Commonwealth Trust Company of Pittsburgh is Trustee for the holders of \$1,773,000 par value bonds issued by the Land and Water Company, and secured by a mortgage upon the irrigation system, and by the pledge of settlers' contracts to the aggregate amount of \$2,337,319.92 (Rec. p. 118), which contracts were given by the settlers in payment for shares or interests in the irrigation system and the water rights connected therewith and are a first lien upon the lands therein described and the appurtenant water rights acquired in the system. The bonds so issued are held by a large number of people in no way

connected with the promotion of the enterprise or with the Land and Water Company as stockholders or officers of said company.

The appellant, A. C. Robinson, holds similar settlers' contracts to the aggregate amount of \$194,-397.48 (Rec. p. 124).

Both of these appellants have, therefore, a most substantial interest in the decree appealed from, which enjoins the collection of any payment and the enforcement of any rights under the contracts. The appellant, Commonwealth Trust Company of Pittsburgh, hereinafter called the Trustee, was enjoined from proceeding with the further prosecution of two suits in equity which it had instituted for the foreclosure of water contracts pledged with it as aforesaid and upon which default had been made. (Rec. p. 190.)

The following facts, we believe, are undisputed:

(a) The Land and Water Company, on April 30, 1908, entered into a contract with the State of Idaho under the Act of Congress commonly known as the "Carey Act" and the laws of the State of Idaho, accepting the terms of such Act and providing a course of procedure thereunder (Plaintiffs' Exhibit "A," Rec. pp. 42-62). The lands to be reclaimed by the irrigation system to be constructed under the terms of said contract, hereinafter called the State Contract, consisted of (1) lands segregated from the public domain under said Act of Congress, (2) lands owned by the State of Idaho, (3) lands held in private ownership or under forms of entry made under

the public land laws under other than the Carey Act, making in the aggregate approximately 150,000 acres, and for the irrigation of such lands the State set aside, in the form of a water permit, and dedicated to the said project 1,500 cubic feet per second of the public waters of the State of Idaho, flowing in what is known as the Salmon River. (Para. IV of Plaintiffs' Exhibit "A," Rec. pp. 47-48.)

(b) That the State Board of Land Commissioners of the State of Idaho was moved to apply under the Carey Act for the segregation of the public lands and to contract with the Land and Water Company for the construction of the irrigation works and to open such lands for entry, by the official report of the State Engineer (Exhibit "F," Rec. pp. 388-391), in which report the State Engineer estimates that approximately 150,000 acres of land may be reclaimed by the proposed irrigation system and that 1500 cubic feet of water per second was available for such purpose.

(c) That on June 1, 1908, pursuant to the State Contract and the statutes of the State of Idaho, 90,000 acres of the public lands so segregated under the Carey Act were thrown open for entry (Rec. p. 223); that before the same could be lawfully entered or filed upon the entryman was under the law required to produce evidence that he had acquired a share or interest in such irrigation system, water rights and franchises sufficient to reclaim the land that he proposed to enter. The share or interest in the system, which the State demanded that the entryman should

first have acquired, is defined in the State Contract, particularly in para. VI (Rec. p. 48), which reads as follows:

“VI. The said party of the first part through its State Board of Land Commissioners agrees that it will not approve any application for or filing on the lands hereinafter described until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for the purchase of sufficient shares or water rights in said irrigation works for the irrigation of said lands; said shares or water rights to be evidenced by the stock of the Salmon River Canal Company, Limited, as hereinafter provided, and the said second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as lands are open for entry and settlement, it will sell or contract to sell water rights or shares for land to be filed upon the qualified entrymen or purchasers without preference or partiality other than that based upon priority of application, it being understood, however, that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but *shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be*

irrigated from the system. The priority of application upon the opening days shall be determined by a system to be devised under the direction of the State Board of Land Commissioners.” (Our italics.)

The shares or interests which the State required the entrymen to purchase and the Land and Water Company to sell are further defined in para. VIII of the State Contract (Rec. p. 50) as follows:

“Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one cubic foot of water per acre per second of time, and each share of water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works together with all rights and franchises therein, based upon the number of shares finally sold in said canal.”

There are other parts of the State Contract referring to the matter but always in substantially the language set out above.

(d) That on June 1, 1908, the Land and Water Company entered into contracts in accordance with the terms of the State Contract for approximately 70,000 acres, and immediately thereafter additional contracts were entered into until the total acreage included in such contracts reached 73,348 acres (Rec. p. 218); that the Land and Water Company has since refused, and still refuses, to enter into further con-

tracts for the sale of shares, interests, or water rights in such irrigation system.

That the State Contract provides that the price for such water rights, shares or interest shall not exceed \$40 per share, one-fifth of which the Company may demand in cash at the time of sale, and the remainder in five equal annual installments, bearing interest at 6%, but the State Contract also provides that it shall not be construed to prevent the sale of shares or water rights on terms more favorable than those therein provided, or to prevent payment in advance of maturity. (Rec. pp. 51-52.) The Land and Water Company sold such shares or interest on the basis of \$3 per acre or share in cash, and the balance in eleven annual deferred payments. (Rec. pp. 67, 149.)

(e) That the system has been completed in accordance with the provisions of the State Contract, except possibly in some minor details of no importance so far as this controversy is concerned and except also that some of the structures were made more durable and larger than the specifications called for. The testimony of the chief engineer of the company, Mr. E. B. Darlington, upon this point is uncontradicted. He says (Rec. pp. 219-220) :

“The canals were designed and constructed with an excess capacity of about 20% over the specifications. That is the exact specification for carrying 1-100 of a second foot or one second foot per 100 acres. They were built with a capacity of about a second foot for 80 acres. The system

was originally built for 100,000 acres, the main canal for 125,000 acres, with 1250 sec. ft. capacity."

That, after the State Contract had been entered into, or about that time, some question arose as to the number of acres that could be irrigated from the average water supply, and the State either consented to or requested that for the present the sale of water rights, shares or interests in the system be limited to 100,000 acres, but the Land and Water Company discontinued or refused to make further sales after it had reached an acreage of a little over 73,000 acres.

(f) That a large part of the money required for the construction of the works and for carrying out the State Contract was obtained through the sale of bonds to the investing public who had no other connection or association with the project. The State Contract permitted the giving of a mortgage for such purpose, "the form of such mortgage to be approved by the Attorney General of Idaho (Rec. p. 60). The mortgage was introduced in evidence but is not a part of the printed record on appeal. It provides in substance that the settlers' contracts shall be assigned to and deposited with the Trustee as security for the payment of such bonds, and that bonds may be issued to the amount of 80% of the aggregate of the principal of the deferred payments payable under such contracts.

(g) That the water supply is less than the amount reported by the State Engineer in his report

to the State Board of Land Commissioners, dated August 12, 1907, and upon which the State acted when it undertook the enterprise and made its proposal to the Federal Government for the segregation of the public lands under the project. (Rec. pp. 388-391).

(h) This suit was commenced by appellees, eight in number, each the owner of about 160 acres under the project and of an equal number of shares or interests in the system, covered by contracts deposited with the Trustee.

The relief demanded by plaintiffs is in substance:

(1) That the amount due from the settlers under their respective contracts with the Land and Water Company shall be decreed to constitute a trust fund, to be used for furnishing each and every acre of land on the project "with an ample and sufficient supply of water, as contemplated by said State Contract and said settlers' contract, and not less than one-half miner's inch per acre, continuous flow, or $2\frac{3}{4}$ acre feet per acre if delivered by periods."

(2) That the lien created by the mortgage of the Land and Water Company to the Trustee be cancelled and declared to be void and of no effect and decreed subject and subordinate to the rights of plaintiffs, and that these appellants be restrained and enjoined from collecting any sum whatsoever from the settlers.

(3) That a Receiver be appointed of the Land and Water Company, with power and authority

to collect the sums due or to become due under the settlers' contract, and to cancel and annul a sufficient amount of such contracts and of the stock in the Salmon River Canal Company to reduce the acreage entitled to water from the system to a point within the water supply "so that the land remaining shall have appurtenant thereto an ample supply of water and not less than the amount claimed by these claimants, as stated in this complaint," and that the Receiver pay out of the moneys so collected under the settlers' contracts the amount required to effect a reduction in acreage and the cancellation of contracts and stock in the Salmon River Canal Company, covering lands that may be left without water, and all damages that may be sustained by the owners of such lands. (Rec. pp. 37-41.)

The defendants and appellants put in issue the construction of the contracts as to the amount of water or interest in the irrigation system acquired per acre under the State and settlers' contracts; and the defendants contending that each settler was entitled to his proportionate part of all the water available, based upon the number of shares owned by the purchaser and the aggregate number of shares outstanding. While plaintiffs contended that they were entitled to a specified amount of water per acre, and, further, that they could not successfully reclaim their lands and produce crops with less than $2\frac{3}{4}$ acre feet per acre during each irrigation season, and on

the other hand the defendants and appellants contended that $1\frac{1}{2}$ acre feet per acre was ample for the successful irrigation of the lands under this project, when delivered in periods and at the times required by the crops and the conditions of the weather.

The Court declined to admit any evidence as to the duty of water and held in effect that it was immaterial that the plaintiffs did not need and could not beneficially use the amount of water which they demanded and which the Court held they were entitled to receive under their contracts, as construed in this case. The refusal of the Court to hear evidence as to the duty of water, or the amount of water required under this project, is assigned as error and the evidence so excluded is embodied in Volume 2 of the Record. The proceedings relative to the exclusion of such evidence are set out in the first volume of the Record, pp. 225 to 278.

It is substantially conceded that no additional water can be procured from any other source for use on this project. As to that feature, the District Court said in its opinion:

“Moreover, when it is remembered that there are no other accessible water resources, and that there is a provision in the contract putting all water right agreements upon an equal footing, regardless of the date of their execution, it will be seen that the question of appropriate and feasible remedy is a most perplexing one should it be held that the plaintiffs are entitled to relief.” (Rec. pp. 281-282.)

The Court decided that:

“An order or an interlocutory decree will be entered restraining the Company from making any contracts or waiving any right of forfeiture of existing ones, and also restraining it, together with the other defendants, from collecting or attempting to enforce payments upon the contracts until the settlers have been provided with the water supply contracted for, or are given trustworthy assurance that it will be provided.”

Following this decision and before any order had been entered in the case, counsel for defendants, appellants here, moved the Court for leave to introduce further proof in order to explain the terms and conditions of the contract between the State of Idaho and the Land and Water Company (Rec. pp. 370-391), but the Court declined to hear further evidence on that point or to reopen the case for that purpose (Rec. pp. 391-393), although the Court had in its original opinion left the case open to either party “to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the Vineyard Company suit hereinafter referred to and now pending in this Court, (2) seepage in the reservoir basin and the canal system, and (3) the aggregate amount of water contracts actually outstanding at the time of the application, and, upon the submission of such proof, for the entry of a final

decree." As stated above, notwithstanding the Court left the case open for the purposes stated, it declined to hear any evidence that might tend to explain or make clear what the Court had said were ambiguous provisions of the State Contract.

On November 29, 1915, an interlocutory decree was entered to the effect that the Land and Water Company had contracted to furnish and supply water at the rate of $2\frac{3}{4}$ acre feet per acre, measured at the point of delivery from the system into the consumers' laterals, for each acre embraced in the aggregate of its water contracts; that such Land and Water Company and the other defendants, including the Trustee and A. C. Robinson, "be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the Court, that said water will be provided, or until the further order of this Court." (Rec. p. 394.)

Under the decree so entered, the Trustee is not permitted to prosecute the suits which it had pending in that Court for the foreclosure of water contracts, and none of the defendants can collect one dollar from the settlers who are grossly in default, and who ever since and including the year 1911 have used and are now using said irrigation system and the water made

available thereby for the irrigation of their lands and for the raising of crops. The order is confiscatory as to these appellants. It destroys the value of their securities. It does not permit them to collect even the reasonable value of what has been furnished or supplied the settlers. It deprives them of recourse to the courts for the enforcement of their rights and for the determination of the damages, if any, that may have been sustained by the settlers and that could be offset against the water contracts. Appellants are deprived of the right to collect from settlers who are satisfied with the amount of water they are receiving and who would have no defense whatever to a suit for the foreclosure of their contracts. From this order the defendants promptly perfected an appeal.

SPECIFICATION OF ERRORS.

The errors relied upon are set forth in considerable detail in the record (pp. 395-401). Stated generally, they are:

1. That the Court erred in holding, decreeing and deciding that the Land and Water Company had in its contract with the State of Idaho or in its contract with the settlers, agreed to furnish water to the amount of $2\frac{3}{4}$ acre feet per acre, and that the Court erred in so construing such contracts.

2. That the Court erred in holding, decreeing and deciding that the Land and Water Company had agreed, either in its contract with the State of Idaho or in its contract with the settlers, that it would not

sell water rights, shares, or interests in said irrigation system in excess of its ability to deliver $2\frac{3}{4}$ acre feet of water per acre.

3. That the Court erred in holding, decreeing and deciding that the Land and Water Company and the Commonwealth Trust Company of Pittsburgh, Trustee, and A. C. Robinson, and each of them, be enjoined and restrained from collecting or attempting to collect, or from enforcing payment under any contract for the sale of water rights, shares or interest in said irrigation system, until such time as the defendants had provided a water supply sufficient to deliver to such settlers $2\frac{3}{4}$ acre feet per acre, measured at the point of delivery from the system into the consumers' laterals, or given trustworthy assurance, to be approved by the Court, that such water would be provided.

4. That the Court erred in holding, deciding and decreeing that the plaintiffs and other settlers under said irrigation system were entitled to receive more than their pro rata or proportionate share of all water available for distribution from such irrigation system, and that the Land and Water Company had in any way agreed or warranted that such settler should receive perpetually during each irrigation season $2\frac{3}{4}$ acre feet of water per acre, or any specified amount, other than his proportionate share of all water available for distribution from said system.

5. That the Court erred in holding and deciding that the duty of water, or the amount of water required per acre under said irrigation system, was

immaterial and that plaintiffs and other settlers under said system were entitled to have provided for them the amount of water called for by their respective contracts regardless of their necessities or needs.

6. That the Court erred in holding and deciding that the form of contract used in the sale of shares or interests in such irrigation system by the Land and Water Company, being plaintiffs' Exhibit "C" attached to the bill (Rec. pp. 62-72) had been prepared by the Land and Water Company and that such contract should be construed more strongly against the defendants than against the settlers.

7. That the Court erred in holding and deciding that the Land and Water Company had issued or caused to be issued or circulated a printed circular, introduced in evidence as plaintiffs' Exhibit 17 (Rec. pp. 147-156), which circular described generally the terms upon which lands could be acquired under said project, the water supply, the soil and climate, markets and natural advantages of the project, there being no evidence that any settler had seen such circular before entering into his contract with the Company, or that any settler had relied in any way upon anything stated in said circular, and there being no evidence as to when such circular was prepared or the relation of the company thereto.

8. The Court erred in declining to consider or admit in evidence the testimony of C. H. Posten, John C. Boren, Joseph Boren, W. M. Worthington, W. T. Holt, J. P. Holmbran, C. J. Griffith, J. S. Welch, J. C. Wheelon, W. G. Sloane, William Wayman, E. B. Dar-

lington, C. C. Thom, A. P. Senior and John Krall, witnesses called by defendants, which testimony was offered for the purpose of showing that the amount of water claimed by the plaintiffs in the bill is unnecessary and is not needed or required for the necessary or proper irrigation of the lands in question; also that the use of the amount of water claimed by the plaintiffs in the bill would be excessive and would be injurious to and impair the value of the lands in question and also that the existing water supply is sufficient for the irrigation of all of the valid existing land entries upon the tract and that the plaintiffs have not and will not be harmed by any alleged insufficiency of the water supply.

9. The Court erred in striking out the evidence of the witness, H. M. Sims, relative to the making of final proof on his land entered under the Carey Act, and as to the statements relative to the water supply made by him in connection with such final proof, and in declining to admit any evidence relative to such final proof.

10. That the Court erred in holding and deciding that the defendants had to deliver to the settlers the amount of water called for by the respective contracts, even though such settler used the water wastefully or to an amount in excess of his reasonable needs.

11. That the Court erred in holding and deciding, without any evidence in support thereof, that at the time the contracts in question were executed "water rights were customarily appropriated, decreed, con-

tracted for, and sold, as definite quantities, and, with rare, if any exceptions, the amount deemed to be necessary, both popularly and by the Courts, exceed the amount here provided for," and that the terms of the contracts here involved were fixed by the Land and Water Company, and not by the settler or any other party to such agreement.

12. That the Court erred in holding and deciding that the Company had entered into contracts to deliver an amount of water in excess of the capacity of the system, and that neither principal nor interest under such contracts could be collected, until the amount of the contracts in excess of such capacity had been cancelled, but failed or declined to determine the amount of such excess or the acreage that could be supplied with the water now available.

13. That the Court failed to enter an enforceable decree or a final decree, finally determining and settling the rights of the parties.

14. That the Court erred in overruling the motion to dismiss, because the bill did not state facts sufficient to entitle complainants to any relief in equity and because of the absence of indispensable parties.

15. That the Court erred in entering any decree in favor of the plaintiffs.

16. That the decision of the Court is contrary to and in conflict with the laws of the State of Idaho as construed by its highest Court, particularly sections 1615 to 1629, inclusive, of the Revised Codes of Idaho.

17. That the decision of the Court and the decree entered herein are contrary to and in conflict with the decision of the Supreme Court of the State of Idaho construing such contracts and the laws of the State of Idaho under which such contracts were entered into and said irrigation system constructed and water rights acquired, and that said decision and decree are particularly in conflict with the following decisions of said Court, to-wit:

State ex rel. West v. Twin Falls Canal Co.,
21 Idaho 410, 121 Pac. 1039.

State v. Twin Falls Canal Co., 151 Pac. 1013.
Idaho Irrigation Co. v. Lincoln County et al.,
152 Pac. 1058.

That the Court erred in denying the application of appellants to introduce additional proof to explain the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, dated April 30, 1908 (Rec. pp. 307-391).

POINTS AND AUTHORITIES.

A suit in equity for the cancellation and annulment of a number of water contracts under a Carey Act irrigation project and for enlarging the proportionate interests which the remaining contract holders shall have in the canal system and water rights thereof, cannot be maintained under equity rule No. 38 by some of the contract holders as representatives of all holders of contracts and water rights in the system, including those whose contracts they seek to have cancelled or annulled, on the ground of an al-

leged shortage of water and the necessity of reducing the acreage to be irrigated from the system.

Raich v. Truax, 219 Fed. 272.

In re Englehard, etc., Co., 231 U. S. 646, 58 L. ed. 416.

In such cases there is a conflict of interest and not a community of interest, and such suits cannot be maintained on the theory of avoiding a multiplicity of actions.

Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380.

In such actions, all water users affected by the decree and all parties having an interest in the irrigation system or water rights are indispensable parties, for a decree cannot be entered without affecting their rights and interests in the system.

The State is a necessary party to a suit by certain water users under an irrigation project constructed under the Act of Congress, commonly known as the "Carey Act," and the laws of the State of Idaho passed in furtherance of such Act and providing for the construction of such system, for the cancellation or annulment of the interests and rights acquired in such system by persons who have filed upon lands under the project, pursuant to the laws of the State, and for enjoining the further sale of water rights to such project and for reducing the acreage that may be reclaimed therefrom and for confining the water right dedicated to such project to a lesser area than that specified in the State Contract for the construction of such project; it appearing that the State is

the owner of lands under the project and that a large part of the Carey Act lands segregated for reclamation from the project remain unentered and that final proof has not been made on the other Carey Act lands.

Sec. 4, Act of Congress, August 18, 1894, 28 Stat. 372-422.

Act of Congress approved June 11, 1896, 29 Stat. 413-434.

Sec. 1613 to 1631, Revised Codes of Idaho.

A corporation contracting with the State of Idaho for the construction of irrigation works under what is known as the Carey Act, is not a seller of water rights and is not the owner of the water dedicated for the reclamation of such project, but is merely a construction company.

Acts of Congress and State laws cited, *supra*.

State ex rel. West v. Twin Falls Canal Co., 21 Ida. 410, 121 Pac. 1039.

State v. Twin Falls Canal Co., (Ida.), 151 Pac. 1013.

Idaho Irrigation Co. v. Pew, 26 Ida. 272, 141 Pac. 1099.

Idaho Irrigation Co. v. Lincoln County (Ida.), 152 Pac. 1058.

In the State of Idaho all waters when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, are the property of the State, and the appropriation and distribution of such waters and the right or interest that may be acquired therein by in-

dividuals, is subject to the regulation and control of the State.

Art. 15, Secs. 4 and 5, State Constitution.

Sec. 3240, Idaho Revised Codes.

Bennett v. Twin Falls North Side L. & W. Co.,
(Ida.), 150 Pac. 336, and cases cited *supra*.

Under the Act of Congress known as the Carey Act and the laws of the State of Idaho relative to the Carey Act projects, the water appropriation for the project is dedicated to all the lands susceptible of irrigation from the system, and the water user is entitled to his proportionate interest in the water rights, canals or other irrigation works, based upon the ratio between the acreage owned and the total acreage susceptible of reclamation from the project.

Federal and State Statutes and decisions cited
supra.

Under the laws of Idaho, the State Board of Land Commissioners has been vested with power and authority to carry out the provisions of the Carey Act and to determine what projects shall be undertaken, how they shall be constructed, and the amount of water that may be dedicated or used for the reclamation of the lands under such project.

Sec. 1613 et seq., Idaho Revised Codes.

State ex rel. West v. Twin Falls Canal Co.,
21 Ida. 410, 121 Pac. 1039.

Idaho Irrigation Co. v. Pew, 26 Ida. 272, 141
Pac. 1099.

Idaho Irrigation Co. v. Lincoln County (Ida.),
152 Pac. 1058.

Provisions of a contract between the construction company and the settler conflicting with the contract between the State and the construction company, relative to the amount of water or proportionate interest in the system to which purchasers of water rights shall be entitled per acre, must yield to the provisions of the State Contract, and purchasers of water rights must be presumed to know the provisions of such contract and the statutes of the State relative to the apportionment and distribution of water under Carey Act projects.

Vague and indefinite expressions in a settler's contract under a Carey Act project as to the amount of water per acre that the settler shall be entitled to receive under his proportionate interest in the system, will not be construed as a guaranty or warranty by the construction company that such water will be available continuously during the irrigation season.

An injunction will not issue at the instance of a water user the effect of which will be to reduce the irrigable area under an irrigation project and to cancel water rights in the system held by others, merely because there is an alleged violation of a contractual right to deliver a specific amount of water, when there is no proof as to the amount of water required or that the amount of water actually delivered is not sufficient to properly reclaim the lands of complainant.

Suits in equity for the foreclosure of liens created by statute and confirmed by contract will not be enjoined in a separate action, for the rights of the party

seeking the injunction may be fully protected in the original suit.

22 Cyc. 810.

3 Elliott on Contracts, Sec. 2499.

16 A. & E. Encyc. of Law, 372.

4 Pomeroy Eq. Jurisprudence, Sec. 1370-1372.

High on Injunctions, Sec. 52.

Savage v. Allen, 54 N. Y. 458.

Wallack v. Society, 67 N. Y. 23.

Waymire v. R. R. Co., 112 Cal. 646, 44 Pac. 1086.

Utah & N. R. Co. v. Crawford, 1 Ida. 770.

Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042.

Mercantile Trust Co. v. B. & O. R. Co., 89 Fed. 606.

Smith v. American Life Assurance Soc., 1 Clarke, (N. Y.) 307.

Lane v. Clarke, 1 Clarke (N. Y.), 310.

Williams v. Brown, 126 N. C. 51; 37 S. E. 86.

Wilson v. Jarvis, 19 Wis. 597.

Dayton v. Relf, 34 Wis. 86.

Robertson v. Montgomery B. B. A., 141 Ala. 348, 37 So. 388.

Frantz v. Masterson, 133 S. W. 740 (Tex. Civ. App.)

Jackson v. Stearns (Ore.), 84 Pac. 798, 5 L. R. A., N. S. 390.

State v. McGee, 15 S. D. 247, 88 N. W. 115.

Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768.

Dyckman v. Kernochan, 2 Paige Chanc. (N. Y.) 26.

Schell v. Erie Ry. Co., 51 Barb. 368.

Hall v. Fisher, 1 Barb. 53.

Redd v. Blandford, 54 Ga. 123.

An injunction will not be granted against other actions which are merely threatened or contemplated.

High on Injunctions, Sec. 64.

Williams v. Brown, *supra*.

Wallack v. Society, 67 N. Y. 23.

Wilson v. Jarvis, 19 Wis. 597.

Wolfe v. Burke, 56 N. Y. 115.

Frantz v. Masterson, *supra*.

Equity will not enjoin the enforcement of a contract for the sale of property at the instance of the purchaser when he is in possession of all or part of what he agreed to buy.

Rischar v. Shields, 26 Ida. 616, 145 Pac. 294.

Frantz v. Masterson, 133 S. W. 740.

Childs v. Lockett, 107 La. 270, 31 S. W. 751.

Burns v. Hamilton's Admr., 33 Ala. 210, 70 Am. Dec. 570.

ARGUMENT.

The decision of the District Court is not only decidedly at variance with the views expressed by the Court during the trial, but the relief granted is of a nature that both the Court and counsel for appellees seemingly conceded during the trial could not be granted in this case, particularly so in view of the

fact that only 8 out of more than 600 water users were before the Court or actually represented in the case. The colloquy between the Court and counsel set out at length in the record, pages 225 to 278, serves at least to show the contentions of the parties and the views of the Court as to the relief that could not be granted in this case, and such views necessarily influenced the parties in the introduction of evidence on the points covered by the views so expressed, and this largely accounts for the application to introduce additional evidence.

We shall refer to this more at length in another part of the argument, but at this time we desire to call attention to what the Court said at pages 270-272. The Court, referring to the argument of counsel for appellees as to the relief that could be granted, said:

“The Court, of course, cannot compel the defendant to do an impossible thing. If the water isn’t available, if the water is not there, and that is the deficiency of the system according to your views, not that the dam has been improperly or insufficiently constructed, or that the system is incomplete—that, as I understand, that the work has been done. The water supply, however, is insufficient, as you contend, and that I understand is substantially your only contention. You do not contend that the system is being mismanaged, or that you are being discriminated against. You are simply contending it has not a sufficient water supply to meet its contracts. Now, assum-

ing that the water supply is insufficient, assuming that the contract should be construed according to your contention, then what can the Court do? The Court can't require the defendant to create water, it can't do that; it could compel it to build another lateral; it could compel it to raise the dam to a higher point; it could compel it to enlarge the main canal, and it could compel it to cut out this catch basin, as it is called, possibly. It could compel it to do anything that is practicable, or that is within the range of reasonable possibility, but how could it compel it to supplement the water supply which it has, and which you contend is insufficient?"

To this counsel for appellees replied that he made no contention that the Company could be compelled to increase its water supply or to do anything that was impossible, whereupon the Court further said:

"Suppose the Court, through its officers, should collect the moneys that are due, or would, according to the terms of these contracts, become due from time to time, what could it do?"

To this, counsel for appellees replied:

"The Court in this case could compel the defendants to refrain from attempting to enforce these water contracts until they have performed, and furnished the water to which we say we are entitled, and we ask in this case that this trust deed, in so far as it may be in excess of the water supply available, be cancelled, and that these de-

endants be enjoined from enforcing or attempting to enforce, or collecting, or attempting to collect, the water payments due, until they give us what we have bought.”

To which the Court replied:

“But suppose they never can do that, would you contend that they could not claim anything against you?”

To which counsel for appellees replied, “No, your Honor.”

The Court further said (272):

“How can I require your Company, in the face of the provisions of your contract, to furnish all the water to certain contract holders and withhold it from others, especially when they are not parties to the suit? * * * * Supposing I had John Jones here, who holds a contract, now, upon what theory could I require him to give up his contract? * * * * (275) Suppose there isn’t water enough for even all of the cultivated lands, then what?”

To which counsel for appellees replied:

“Then, in my opinion, as between the persons who have applied the water, the doctrine of priority would determine absolutely their rights in the last analysis.”

And to this the Court replied:

“That couldn’t be done without having the parties before me. I suggested at the prelimi-

nary hearing that if that relief should be asked for you should bring in other parties, and you decided not to bring them in.”

The foregoing is sufficient to show that both the Court and counsel regarded the absence of the other 600 or more water users and contract holders as seriously interfering with the granting of the proper relief in the event it should be found that plaintiffs had in any way been wronged or injured by any of the defendants. A motion to dismiss for want of proper parties and for want of equity in the bill had previously been overruled, and at that hearing the Court had also, as is shown from the statements in the colloquy referred to above, expressed the opinion that full and proper relief could not be granted if the situation described in the bill actually existed, without the presence of the other water users and contract holders.

Before taking up the argument as to the proper construction of the State Contract, we desire to discuss briefly whether the Court had jurisdiction to make the order or interlocutory decree entered in this case or to make a final decree in accordance therewith. Obviously, if the District Court was without jurisdiction, it will not be necessary for this Court to consider the other important questions involved in the case.

THE COURT, BECAUSE OF THE ABSENCE OF INDISPENSABLE PARTIES, DID NOT HAVE JURISDICTION TO ENTER ANY DECREE IN THIS CAUSE.

There are approximately 600 contract holders under this project holding contracts covering over 73,000 acres, whereas only eight of such contract holders, holding contracts covering about 1400 acres, are before the Court in this suit. Under plaintiffs' proof, all contracts are substantially alike as to form, and one contract is as sacred and binding as the other, and the State Contract expressly provides "that priority of application or priority of entry or settlement shall not give any priority of right to the use of water flowing through the canal against subsequent purchasers but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system." (Rec. p. 49.)

This is not a class suit within the meaning of equity rule 38, for here the interest of each contract holder is opposed to any other water user being given more than a pro rata share of the available water. The interest of each contract holder is likewise affected by the cancellation or annulment of any other contract, for it increases his share of the burden of maintaining and operating the property. If 73,000 acres are irrigated from the system, each contract holder is liable for a proportionate part of the maintenance based upon the total acreage entitled to water. If the acreage be reduced to 35,000, his proportion of the expense is substantially double what

it was before. Every water user is a stockholder in the Salmon River Canal Company, holding shares in that Company equal to the number of acres owned or entered under the system. A reduction in acreage is a reduction in the capital stock of the corporation of which the water user is a stockholder. Manifestly, any decree that changes the plan of distributing the water or that gives to any person more than his proportionate share determined as provided in the State Contract, affects every water user under the project; and any suit which has for its purpose the *re-making* of the project or the accomplishing of a substantial change in the manner of distributing the water, or in the amount that shall be distributed to each settler, or that changes to any substantial degree the pro rata part of the cost of maintenance, must have before it all the parties that will be affected by the decree.

It would seem that the State of Idaho is also a necessary and indispensable party, for the Court is asked and in fact undertook to change the State Contract by reducing the acreage that shall be supplied with water from the system. There can be no denial of the fact that the State Board of Land Commissioners had the power under the law to determine the acreage that should be irrigated from the available water supply. The State Contract shows that the Land Board undertook to distribute the supply over 150,000 acres, or the entire acreage irrigable from the system. The State was the owner of the water and the Board was charged with the duty of applying it in a way that would result most advantageously to the State.

Sec. 3240, Revised Codes of Idaho (1908), provides:

“Sec. 3240. Water being essential to the industrial prosperity of the State, and all agricultural development throughout the greater portion of the State depending upon its just apportionment to and economical use by, those making a beneficial application of the same, its control shall be in the State, which, in providing for its use, shall equally guard all the various interests involved. *All the waters of the State*, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State, *are declared to be the property of the State*, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose * * * * .” (Our italics.)

This statute has been in force in the State of Idaho since the 18th day of March, 1901 (Sess. Laws, 1901, 191). The legislature has assigned to the State Board of Land Commissioners the duty of carrying out the terms of the Federal and State laws relative to the reclamation of lands under the Carey Act, and it was the duty of that Board to determine the sufficiency of the water supply and the amount of water that should be allotted per acre for the reclamation of such land. The provision of the State Contract wherein the State Board *dedicated the water to the reclamation of all the lands under that project is clearly within the power of the Board*, and there is

no authority anywhere for either State or Federal Courts assuming either the responsibility or the authority to distribute the water on Carey Act projects upon any basis other than that prescribed by the State Board. Other parts of the brief will deal more at length with the power and control of the State over the appropriation and distribution of the water resources of the State, and it is sufficient here to say that the power of the State in such matters is no longer an open question. The State, as the owner of the water set aside for this project, had the power to regulate its appropriation and use, and it had the right to designate the tribunal that should have discretion, supervision and control over the distribution and use of water on Carey Act projects, and the determination of the State Board in such matters is not subject to review by the Court; especially not, in a collateral attack on the State Contract.

The decree of the Court here appealed from vitally concerns the reclamation of the lands segregated or owned by the State. It practically re-makes the project as planned by the State Board, and directs that the water supply dedicated to the entire project shall be confined to about half of the project lands. It would seem that the State, or the State Board that made the contract involved, is an indispensable party to a suit of this character. It will be noted that the complaint was originally brought against these appellants and the State Board of Land Commissioners, but at the beginning of the trial plaintiffs dismissed the suit as against the State Board. The

printed record does not contain the order of dismissal but it will not be denied that such order was made.

We submit, therefore, that there is an absence of indispensable parties, and that the Court was without jurisdiction to render any decree in this case.

UNDER THE LAWS OF IDAHO AND THE STATE AND SETTLERS' CONTRACTS INVOLVED IN THIS CASE, A SETTLER IS ENTITLED TO HIS PRO RATA PART OF THE AVAILABLE WATER, AND HE IS NOT ENTITLED TO $2\frac{3}{4}$ ACRE FEET PER ACRE OR ANY OTHER SPECIFIED AMOUNT WITHOUT REGARD TO HIS NEEDS OR NECESSITIES.

If this Court concludes that the District Court had jurisdiction of the matter involved and that the necessary parties are before the Court to enter the decree here appealed from, a correct construction of the State and settlers' contracts becomes of paramount importance.

The right of ~~the~~ parties to contract relative to the sale and delivery of water or rights in irrigation canals, is so dependent upon the laws of the State and the public policy that obtains relative to the appropriation, sale and rental of water for irrigation purposes, that a correct construction of the contracts cannot be reached from simply an examination of the contracts without regard to the laws and public policy of the State.

It will be conceded that irrigation projects constructed under the Carey Act, under State and Federal laws and the supervision of the public authorities, have a legal status somewhat different from pro-

jects constructed by private companies and in which water rights are sold or rented. Preliminary, however, to a discussion of the Carey Act projects here involved, we desire to review briefly the development of the law relative to the sale and rental of water for irrigation purposes.

The early history of irrigation in the West shows that absolute freedom of contract originally obtained as between the company and the consumer or user. But legislation was soon demanded to correct the abuses that grew out of such a system, and in response to a demand for public supervision over the appropriation and distribution of water, Colorado in its first constitution, adopted in 1876, provided that:

“Sec. 5, Art. XVI. The water of every natural stream not heretofore appropriated within the State of Colorado is hereby declared to be the property of the public; and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided.

“Sec. 6, Art. XVI. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied * * * * .”

The immediate necessity for general legislation on the subject was to some extent relieved by the decision of the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113, decided in 1877, where it was held that there was ample remedy in the common law, in the absence of statute, to protect the public against unreasonable charges and discrimination

in service. Notwithstanding the decision in *Munn v. Illinois*, the people of California, in their new constitution, adopted in 1879, provided that:

“Sec. 1, Art. XIV. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law * * * * .

“Sec. 2, Art. XIV. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.”

The California constitution also contained provisions for determining the reasonable rates to be charged by corporations engaged in the sale and rental of water for irrigation and other purposes.

The Idaho constitution, adopted in 1889, followed closely the constitutions of Colorado and California on this subject. It provides:

“Sec. 1. The use of all waters now appropriated, or that may hereafter be appropriated, for sale, rental or distribution; *also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed*, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner prescribed by law.

“Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city, or town, *or water district*, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.”

The words in italics are not in the California constitution, thus showing an intention on the part of the people of Idaho to go somewhat further in the matter of regulation and control than had been done in California.

It will be noted that the Colorado constitution differed primarily from that of California and Idaho, in that in Colorado water was declared “to be the *property of the public*, and the same is to be *dedicated* to the use of the people of the State,” whereas in California and Idaho the “use” of the water was declared “to be a public use, and subject to the regulation and control of the State, in the manner prescribed by law.” The distinction is now of importance only as it helps to explain the differences that have arisen in the Court decisions of these States in the construction of contracts and the right of the State to regulate and control.

The Supreme Court of California in Fresno Canal & Irrigation Co. v. Park, 129 Cal. 437, 62 Pac. 87, in upholding a water contract, contrary to the decisions of the Supreme Court of Colorado, said:

“Both sides cite cases from Colorado, some of which are favorable to the respondent’s views and

others, no doubt, favorable to some extent to the views of appellants. But the latter are, we think, mainly founded upon the provision of the constitution of Colorado, materially different from the provisions of our constitution on the subject, which declares that the water of all natural streams not theretofore appropriated is 'the property of the public.' "

The Supreme Court of Idaho, in *Wilterding v. Green*, 4 Ida. 773, 45 Pac. 134, decided in 1896, while following the Colorado Courts in holding that a private ditch company engaged in the sale and rental of water rights could not charge a bonus or fee for a perpetual water right, declined to go to the full extent of the Colorado decisions, and it called attention to the fact that under the constitution of Colorado water was "the property of the public." The Idaho Court said:

"The doctrine of the Colorado Court, that the canal or ditch owner is a mere common carrier, could not, certainly, be predicated upon the provisions of the Idaho constitution. That it was the purpose and intention of the Idaho constitution to deal only with the 'use' of water, and not with the property rights of the proprietors therein, is, I think, further evidence by including within its provisions 'all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented or distributed.' The sale, renting and dis-

tributing of the water is a dedication, and brings its use under the control of the State, but it in no sense destroys or abrogates the property rights of the appropriator therein."

The Colorado Courts, under the constitution of that State, have consistently held that the owner of a rental right was an appropriator, "through the intermediate agency of the ditch."

Wheeler v. Northern Irrigation Co., 10 Colo. 582, 17 Pac. 487.

In *Wyatt v. Larimer, etc., Co.*, 18 Col. 298, 33 Pac. 144, the Court said:

"We adhere to the doctrine that such a Canal Company is not the proprietor of the water diverted by it, but that it must be regarded as an intermediate agency for the purpose of aiding consumers in the exercise of their constitutional rights, as well as ^athe private enterprise prosecuted for the benefit of its owners."

The fundamental distinction between the earlier California decisions under the constitution of that State and the decisions of the Colorado Courts may be said to be that in California greater latitude of contract was permitted, and the public control was not as complete as in Colorado. It is of little importance now whether the California Courts were correct in the construction which they placed upon the constitution of that State, but the fact remains that a necessity for a change in the law was for practical reasons demanded, and the change was eventually

brought about, first, by a radical change in the later decisions of the Courts of that State, and still later by an amendment to the statutes so as to make the Colorado doctrine applicable in all essential detail to California. The many important cases in the United States Circuit Court for the Southern District of California, before Circuit Judge Ross, furnish an interesting history of the struggle for recognition by a correct economic principle advanced before the public generally appreciated either its correctness or importance. While these decisions were at times reversed by the Circuit Court of Appeals and by the Supreme Court of the United States, the reversal always rested upon the proposition that in matters of local law the Federal Courts will follow the decision of the highest Court of the State, which in these matters had taken a narrower view of the constitution and the questions involved.

Lanning v. Osborn, 76 Fed. 319.

Souther v. San Diego Flume Co., 112 Fed. 229.

San Diego Flume Co. v. Souther, 90 Fed. 164.

San Diego Land and Town Co. v. City of National City, 74 Fed. 79.

An interesting review of the decisions of the California State and Federal Courts, and of some of the Idaho decisions bearing on the subject, is contained in the decision of this Court in Imperial Water Co. No. 5 v. Holabird, 197 Fed. 4.

The Supreme Court of California, in Leavitt v. Lassen Irrigation Co., 157 Cal. 82, 106 Pac. 404, 29

L. R. A. (N. S.) 213, modified to a very large degree its former decisions, or in any event the construction that others had placed on such decisions. In the latter case, decided in December, 1909, the Court says, speaking of the owner of the ditch:

“He, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purpose any part of this water. If he could reserve a part, he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership; or, if he could reserve a part for himself, he could, with equal authority, give away parts of the supply to others, and by this method destroy what the Constitution itself has declared shall forever remain a public use.”

In that case, one of the former owners claimed a private right in the system prior and superior to the rights of the renters or other owners of water rights. The Court again says:

“Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the constitution of 1879. He was but the purveyor

of this public use, the agent in the execution of this public trust. If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself."

Referring to the duty of one who has appropriated water for sale or rental, the court quotes with approval from a prior decision of that court as follows:

"Every corporation deriving its being from the Act above cited has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created."

The court also quotes from another decision of the same court as follows:

"Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it in a reasonable manner."

The court then quotes from an Indiana case as follows:

"No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is 'affected by a public interest' it must supply all alike who are like situated, and not discriminate in favor of nor against any."

Again the court says:

“We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its water, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust * * * . We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the State for public rental, distribution, and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their quantity shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned, between its consumers.”

Even the decision in *Leavitt v. Lassen Irrigation Co.*, *supra*, did not satisfy the demand in California for public control over the appropriation and distribution of water, for in 1911 the legislature of Cali-

fornia amended sec. 1410 of the Civil Code so as to provide that, "All water or the use of water within the State of California is the property of the people of the State of California", and this was followed by the adoption of ^{the} Water Code at the 1913 session of the legislature, which dedicated all waters in their natural channels to the public and declared them to be the property of the state, thus changing the law of California to conform to the law of Colorado as construed by the Colorado decisions above referred to, and also to conform to the views expressed so frequently by the U. S. Circuit Court for Southern California.

A very interesting review of the authorities and discussion of the subject is contained in the opinion of Circuit Judge Morrow in *San Joaquin and Kings River Canal and Irri. Co. v. Stanislaus County*, 191 Fed. 875. After reviewing the decisions in many of the western states and of the Supreme Court of the United States, the court said:

"In these cases, the theory that the irrigation company is an intermediate agency in the execution of a public trust is necessarily based upon the doctrine that the right to appropriate water is attached to the land. The company cannot at the same time be principal and agent. It cannot own the water or the right to appropriate and sell it, and at the same time be the agent of the public in appropriating it for a public use. The logical relationship of such a company to its appropriated water is that of agent of the owner of the

land in diverting and bringing the water to the land for which it has been appropriated. But it is immaterial whether the company is deemed to be the agent of the public in diverting and carrying the waters owned by the public to the consumer who owns the right to its beneficial use, or the agent of the consumer in diverting and carrying the water to his principal for a beneficial use. In either case, while the carrier is entitled to be paid for his services as a carrier a reasonable compensation under such regulations as the law may prescribe, he is not the owner of the water carried or the water right created by its diversion, and he cannot compel the consumer to purchase it and to pay for its use, either in the way of an annual or other rate upon its supposed value as a property right * * * .

“This theory of the relation of the carrier to the water right as an intermediate agent is in accord with the law of beneficial use prevailing in all the Western States where the right of appropriation is derived from Act Cong. July 26, 1866, c. 264, 14 Stat. 251, and is there limited to some useful or beneficial purpose * * * .

“To the same effect is the desert land act (Act March 3, 1877, c. 107, 19 Stat. 377), where it is provided that the right to the use of water on desert lands ‘shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation.’ * *

“Sec. 8, Act Cong. June 17, 1902, c. 1093, 32

Stat. 390, commonly called the 'Irrigation Act', provides that:

"The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'

"The same provision has been incorporated in the laws of most of the Western States, not however, as new legislation, but as the established definition of a water right under the acts of Congress and the constitutional provisions of the states declaring that the use of appropriated water is a public use. * * * The water right must, therefore, be the right ~~to~~ of the consumer and attached to his land, and not the right of the complainant attached to the canal system. It follows that, under the law of this state, it cannot be valued as a property right upon which the complainant is entitled to an income from the water rate to be paid by the consumer. * * * I conclude that it is not a right that complainant is entitled to have valued as its property right in this case."

While the decision in the above case was reversed by the supreme court, the reversal must rest entirely upon the ground that under the laws of California in force at the time the appropriations in question were made, the appropriator acquired a proprietary interest in the water, for there can be no question but that a state can, by its constitution or statutes, provide that rights to the use of the public waters of the state, acquired after the statute takes effect,

shall not be valued in determining the value of the investment upon which the canal company is entitled to a reasonable return. Hence the decision would undoubtedly be sustained when applied to appropriations made under the present California law, or under the Idaho statute of 1901, hereinafter referred to.

We have gone thus at length into the laws and decisions of Colorado and California for they have an important bearing upon the construction of the laws of the State of Idaho involved in this case.

As heretofore stated, the supreme court of Idaho in *Wilterding v. Green*, 4 Idaho 773, decided May 1, 1896, followed the California decisions and distinguished the Colorado decisions, because under the laws of Colorado the waters were "the property of the public." Following that decision and in 1901, the legislature of the State of Idaho expressed itself in no uncertain terms as to the ownership of the waters flowing in their natural channels, and the right that could be acquired therein by appropriators. By this statute the laws of Idaho became for all practical purposes like those of Colorado, as construed by its highest court. The Idaho statute above referred to is now Sec. 3240 of the Revised Codes, and reads as follows:

"Sec. 3240. Water being essential to the industrial prosperity of the State, and all agricultural development throughout the greater portion of the State depending upon its just apportionment to, and economical use by, those making a beneficial application of the same, its control shall

be in the State which, in providing for its use, shall equally guard all the various interests involved. *All the waters of the State, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the State are declared to be the property of the State, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the State for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied; and the right to continue the use of any such water shall never be denied or prevented from any other cause than the failure on the part of the user thereof to pay the ordinary charges or assessments which may be made to cover the expenses for the delivery of such water.*" (Our italics.)

It will be noted that the trend of legislation has been rapidly and consistently towards not only public control over but public ownership of the water resources, with a supervision over the distribution and use of water not foreseen in the early history of irri-

gation, ^{due to} ~~that arose from~~ the fact that the amount of water was limited and the beneficial uses to which it could be applied were far in excess of the available supply.

The Federal legislation on the subject is equally interesting. The act of July 26, 1866, consented to the appropriation of water on the public domain for beneficial purposes wherever such appropriations were recognized or acknowledged by local customs, laws and the decisions of the courts, and it gave the necessary rights of way over the public domain for the construction of ditches and canals used for conveying water for mining, agricultural, manufacturing or other purposes. This was followed by the act of March 3, 1877, commonly known as the "Desert Act," in which the Federal Government limits desert entrymen to such water as is necessary for "the purpose of irrigation and reclamation," and this act further provided that "all surplus waters over and above such actual appropriation and use, together with the waters of all lakes, rivers, and other sources of water supply *upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*"

This act shows clearly an intention on the part of the Federal Government to conserve the unappropriated water on the public domain for the reclamation of public lands, and it may be noted here that the project involved in this case consists largely of

public lands and that the appropriation was made on the public domain for the reclamation of such public lands. The Desert Land Act was followed by provisions in the Appropriation Act of October 2, 1888, c. 1069 (25 Stat. L. 526), and the Act of March 2, 1899, c. 411 (25 Stat. L. 960) providing for investigations by the Geological Survey of reservoir and canal sites and "for the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation." This legislation was again followed by what is known as the Carey Act, being section 4 of the Act of August 18, 1894, (28 Stat. 372-422), and the amendments thereto of June 11, 1896, (29 Stat. 413-434) and other amendments not necessary to be noticed here. It was the purpose of the Carey Act to accomplish the reclamation of the public domain through the agency of the states and under state supervision and control. This legislation was again followed by the Federal Reclamation Act of June 17, 1902, under which the works are constructed and operated and controlled by the Federal Government. This Act, as construed by the Department, not only limits each water user to his pro rata part of the available water but it also contains limitations not only on the amount of land which a settler may be permitted to reclaim from the system, and makes his right to water dependent upon actual residence on the land, or in the neighborhood thereof. A water user, upon payment of all charges, acquires an undivided and proportionate interest in the system and water rights connected

therewith. The Act discourages waste in the use of water. It provides that "the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

With this review of the decisions and the legislation on the subject, we take up the construction of the contracts and statutes directly involved in this case.

THE CAREY ACT.

Section 4 of the Act of Congress, approved August 18, 1894, c. 301, 28 Stat. L. 373-422, granted to each of certain designated Western states, one million acres of land, such lands to be selected by the states, and segregated from the public domain, from time to time as a plan or means for reclaiming the same was found. The purpose of the Act as stated therein was "to aid the public land states in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers."

The original act contemplated that the state itself would undertake the construction of the necessary irrigation works and use its own credit in financing the enterprise. The original act further provided that patents should not issue from the Federal Government to the state until proof was submitted that the lands "are irrigated, reclaimed, and occupied by actual settlers."

In view of the fact that none of the states could, under their constitutions, use the credit of the state for the purposes contemplated by the Federal Act, the amendment of June 11, 1896, (29 Stat. 413-434), became necessary in order to make the law of any practical value to the states. This amendment provided that "a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

This statute permitted the State to give security to contractors that could be induced to contract with the State for the construction of the works. The security was not the credit of the State which the constitution prohibited the State from using, but it was part of the assets of the Federal Government which would be donated to the State, subject to the lien authorized by the amendment, when the reclamation of the land had been accomplished. The amendment, however, did not provide that the Federal Government could retain the title to the land so pledged as security until it had been actually "irrigated, reclaimed and occupied by actual settlers", as provided in the original Act, but this part of the Act was modified by the amendment so as to provide that:

"when an ample supply of water is actually furnished in a substantial ditch or canal, or by arte-

sian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation."

The effect of this amendment was to permit the issuance of patent to the State for the entire segregation upon proof that the necessary works had been constructed to accomplish the reclamation thereof.

The Federal Government assumed, and the Act clearly contemplated that the water for the project had been dedicated to all the lands that could be irrigated therefrom, and that each acre would be entitled to its proportionate share of the available water; and it would be a clear violation of the Federal law for the State to undertake to confine the water supply to less than the tract so patented under the Act. The State could not dispose of the lands to settlers under contracts, that would give to the settlers or entrymen more than their proportionate part of the water dedicated to the project. Such contracts would leave some of the land in a position where it could not be reclaimed from the water right upon which the Government relied when it patented the lands to the State. Clearly, it would be a fraud upon the Federal Government for the State to permit the water that had been dedicated for the reclamation of the project to be unevenly distributed, or to be diverted or used upon other lands, devoted to other uses, or restricted to the use of only some of the lands segregated. The fact that patent has not issued for

the lands involved in the present project does not alter the proposition that the State contract was entered into upon the theory that the Federal Act required the water to be distributed over the entire project pro rata.

We submit, therefore, that the Act of Congress involved in this case must be construed to require that each acre of land susceptible of irrigation from the system shall receive its pro rata and proportionate part of the water dedicated and set aside for the reclamation of the lands under the project. Any other construction will lead to conditions and situations that Congress manifestly could not have intended. This is the construction that was placed upon the Act by the legislature of the State of Idaho.

STATE LAWS.

The laws of the State provide, and they cannot be consistently construed otherwise, that a water right consists of "a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto." (Sec. 1615, Idaho Revised Codes). It will be noted also that the Idaho laws do not require any guaranty or information whatsoever as to the water supply from the contractor or construction company that contracts with the State for the construction of the artificial works required for the reclamation of lands under the Carey Act.

The Federal Act provides that the lien which the State is authorized to create in favor of the company

constructing the works must be limited to "the actual cost and necessary expenses of reclamation and reasonable interest thereon." The Act contemplated that no unusual profit should be made out of the reclamation of such lands. It contemplated that the State should be reimbursed for the actual cost of constructing the artificial works with reasonable interest, and it was permitted to subject the Federal lands to a lien for such purpose in order to obtain the necessary capital for accomplishing their reclamation. The Act did not contemplate that the settlers on such lands should be required to pay the State, directly or indirectly, for the water used thereon. The plan simply was that the Federal Government should donate the land and the State should furnish the water, and the land and water combined should be security for the cost of constructing the artificial works. We think that this is the only reasonable construction that can be placed upon the State and Federal legislation bearing on this question.

Proceedings looking to the reclamation of the lands here involved were initiated in 1907, long after the State had adopted Sec. 3240 of the Revised Codes, hereinbefore referred to, which declared that all waters flowing in their natural channels were the property of the State and that the control thereof should be in the State. Neither Congress nor the State legislature contemplated that the State, in carrying out the provisions of the Federal Act, would resort to the subterfuge of first granting the water to the promoter, and then entering into a contract

with him whereby he would be permitted to charge the settlers for the water as well as for the cost of constructing the works, with reasonable interest thereon. The statute should be very clear, indeed, before a Court would be justified in construing it so as to permit of such absurd proceedings. The State and Federal legislation clearly show an intention to accomplish the reclamation of the lands in a way that will reduce the expense to the settler and give him in effect a water right at actual cost with reasonable interest.

The Carey Act and the State laws under it are in this respect substantially identical with the "Reclamation Act" of June 17, 1902, except that that Act provides that the settler shall pay "the estimated cost of construction of the project," whereas under the Carey Act he is required to pay reasonable interest thereon in addition to the actual cost. Neither Act contemplates that the State or Federal Government can assess against the settlers a charge for the public waters of the State that have been dedicated to the reclamation of the lands. If this can be done under the Carey Act and the State laws referred to, it can be done under the Reclamation Act, thus turning those Acts into schemes for making profits out of the sale of the public waters of the State instead of beneficent acts intended for the home-builder and for the reclamation of arid lands in a way that will encourage their immediate development.

In the appendix to this brief, we have set forth so much of the statutes of the State as would seem

to have any bearing upon the questions now before the Court.

Under Sec. 1613, "the selection, management and disposal of said land shall be vested in the State Board of Land Commissioners." Sec. 1615 provides for tenders, proposals or bids for constructing works which the State may find it feasible to construct for the reclamation of the lands under the Carey Act. The request or proposal submitted to the Board by the contractor must be accompanied not by proof of ownership of water by the contractor, but "by the certificate of the State Engineer that *application* for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon." It will be noted that the only evidence of the availability of water which the Board considers is the certificate of the State Engineer and his report on the water supply. The law, of course, assumes that old appropriations cannot be used for new projects, for the water is under the constitution appurtenant to the land to which it has been applied, hence the State Engineer simply certifies that an *application* for a permit to appropriate water for this particular project has been filed in his office, the effect of which can simply be to reserve the water for the time being for use upon that project in the event the Board concludes that the project is feasible and undertakes the construction of the works.

Sec. 1617 carries out the same idea and requires the application to be of a form prescribed by the State Engineer.

The filing of the application, or the acceptance thereof and the issuance of the permit, does not, however, make the contractor the proprietor of the water or give him a proprietary interest therein. The contractor is at most but an instrumentality in the dedication of the water to the lands to be reclaimed from the proposed works. If it can be said that the settler has a title to the water or to the use of the water dedicated for such project, it may be that the contractor serves as a conduit for passing title to the use from the State to the settler. But clearly the contractor has no proprietary interest in the water. Such interest is prohibited under the constitution and Sec. 3240 of the statutes. It is manifest also that the contractor cannot sell the water for use upon other lands, neither can he use it for other purposes. The contractor, in fact, can make no use whatever of the water; he cannot even divert it from the stream except as the settlers may need it in their farming operations.

The law does not contemplate that the person making the proposal mentioned in Sec. 1615, acquires, by merely filing an application for a permit, such a proprietary interest in the water that the State cannot contract with others for the reclamation of these lands in the event the person making the proposal demands unreasonable charges or conditions. Clearly, the Board is at liberty to contract for the construction of the works with those who will make the most feasible terms or who may be "the lowest responsible bidder." Certainly the filing of the appli-

cation for a permit does not create a monopoly in the applicant that ties up the resources of the State and prevents the Board from considering the proposals of other contractors.

We submit, therefore, that the contractor is neither the owner nor the seller of the water dedicated for the project. He is simply a contractor and he is so designated in the statutes (Secs. 1621 and 1624), and he receives his pay for the work performed and material and supplies furnished in the construction of the canals, reservoirs and ditches, from the settlers upon the terms and to the amount fixed by the Board in the State contract; and his payments are secured by the lien created by the Federal Act and the laws of the State passed in pursuance thereof.

Sec. 1615 further provides that the contractor shall submit plans and specifications of the proposed works and maps showing the location thereof as well as an estimate of the cost of the works and "the price and terms per acre at which perpetual water rights will be sold to settlers in the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto." The phrase "perpetual water rights" as used in the section means neither more nor less than a proportionate interest in the canal or other works and in the rights and franchises attached thereto. This is the only construction of which the statute is susceptible, and it has been so construed by the Courts of the State. And that is also the construction that

was placed upon the statute by the Board and by those contracting with the State for the construction of such works, as shown by the State Contract involved in this case and also by the contracts that have been used in connection with other projects. (Rec. pp. 308-391.)

THE STATE CONTRACT.

The State Contract shows a consistent purpose on the part of the State Board of Land Commissioners to carry out the foregoing theory of the Federal and State legislation under which the Board was acting.

Paragraph I of the contract, Record p. 43, provides that the Land and Water Company "agrees to construct and build those certain irrigation works * * * * and to sell *shares* or *water rights* in said canal and irrigation system * * * * to the person or persons filing upon the lands hereinafter described * * * * , said *shares* or *water rights* to be sold on the terms hereinafter provided and also to transfer the ownership, management and control of said canal system to the purchasers of *shares* or *water rights* as hereinafter provided."

Manifestly, "water rights," as used in the foregoing paragraph and as used throughout the contract were intended to be synonymous with "shares," for it could not have been intended to leave it optional with the Land and Water Company, whether it would sell *shares* in the canal and irrigation system, or *water rights* therein, or *shares* to some and

water rights to others, and the last sentence of the paragraph requires the Company to turn over the management and control of the system to the purchasers of "shares" or "water rights." If the terms are not synonymous, was the management to be turned over to the purchasers of the *shares* or to the purchasers of the *water rights*?

The paragraph further shows that the contractor was to build the works and to sell shares therein to all entrymen and owners of land susceptible of irrigation from the system. It was given no option or discretion except that its agreement to sell shares or water rights was restricted to lands under the system. Manifestly, this could not be carried out unless the water supply was dedicated to the entire project so that each acre of land was entitled to the same proportionate share of the water supply. If the contractor had the option of applying to some of the land more than its proportionate part of the whole, then there would necessarily be discrimination between the entrymen and the appropriation made for the project might be exhausted before all the entrymen had been given an opportunity to purchase shares or water rights for their lands.

Paragraph IV of the contract, Record p. 47, has "Appropriation of Water" as its heading, and it deals with the "appropriation" which is frequently referred to throughout the contract. The term "appropriation" as used in this contract, does not mean the varying or fluctuating quantity of water that may actually flow in Salmon river at different sea-

sons of the year, but it refers to Permit No. 2659, or the 1500 cubic feet per second appropriated for and dedicated to the use of this project, which appropriation the contract shows should be used for the irrigation of 150,000 acres. That is the acreage which the State Engineer's report on the project shows was irrigable therefrom (Exhibit "F," Rec. pp. 388-391), and 1500 second feet distributed over 150,000 acres would be the equivalent of one one-hundredth of a second foot per acre.

The State Contract shows clearly that the State Board of Land Commissioners intended to reclaim 150,000 acres of land with the appropriation evidenced by Permit No. 2659. The contract states that this water shall be "used for the irrigation of the lands described in Exhibit "A" herewith, together with other lands susceptible of irrigation from said system, *which water right is hereby dedicated for use upon said lands.*" This language leaves little room for contention that the water could be confined to only part of the lands.

It is further provided in this paragraph that the reservoir shall have an impounding capacity of 180,000 acre feet, but the statement which follows, viz., "which amount, in addition to the normal flow of said stream during the irrigation period, has been determined to be sufficient to furnish $2\frac{3}{4}$ acre feet of water per acre for each acre of land irrigated," is simply a statement of the opinion entertained or determination made by the State Board and is not a covenant or agreement on the part of the contractor

to forever guarantee that there shall be that amount of water available in the stream for use upon this project. The covenant of the contractor comes in the last part of this paragraph, viz., "and the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof *at the rate* of one hundredth of a second foot per acre for each acre of land to be irrigated." The contractor had previously agreed to build a reservoir with a capacity of 180,000 acre feet, and the record is undisputed that it has been constructed with a capacity of 185,000 acre feet (Rec. p. 191). The part just quoted simply covers the capacity of the canals and lateral system. It has nothing whatever to do with the contractor guaranteeing the water supply. It means what it says, that the *structure shall have a carrying capacity sufficient to deliver*, not that the contractor shall deliver, water at a certain rate of flow, a provision that is highly proper and essential in any contract dealing with the construction of irrigation works. Instead of setting forth the grade and dimensions, in feet and inches, of the different structures, the Board very wisely uses general specifications that are far more satisfactory and require a great deal less detail calculation, and it thereby eliminates the possibilities of error that would otherwise be involved therein; the specifications for the capacities of the numerous ditches, laterals and canals are here set forth in one sentence.

Paragraph VI deals in part with the same subject

matter and carries out the same plan of applying the water to all the lands under the project. The statement (Rec. p. 49) that the contractor agrees "that to the extent of the capacity of the irrigation works and to the extent of the water rights to which it is entitled as rapidly as the lands are opened for entry and settlement, it will sell and contract to sell water rights or shares for land to be filed upon," has reference to the water appropriation described in Paragraph IV, viz., Permit No. 2659. It cannot be possible that the Board intended to leave "the extent of the water rights" to which the company might sell shares in the system to be determined after the shares had been sold and the lands entered and improved by the settlers. Had that been the intention, the contract would not have been *silent* on a matter of such importance. Such construction of the contract would be most unreasonable; such action on the part of the Land Board would be most reprehensible, and it is entirely inconsistent with the provisions of the law that the State Engineer shall investigate and report on the sufficiency of the water supply before the segregation is made. This provision of paragraph IV is a requirement that the contractor shall accept applications for shares or water rights in the system to the extent of the appropriation that had been made for the project and to the extent of the capacity of the works which it had undertaken to construct, and is also a limitation that it should not sell beyond such capacity, which the contract shows had been fixed at 150,000 acres.

The latter part of the paragraph makes certain that there can be no preference or priority between water users under the project and that each purchaser is only entitled to his proportionate interest, for it provides that priority of entry gives no preference over subsequent purchasers "but shall entitle the purchaser to a proportionate interest only therein;" and as if to emphasize and make doubly sure that no purchaser could misunderstand the interests that he would acquire the Board again declares that, *"the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system."*

Our contention that the appropriation set aside for this project was dedicated to all the lands to be reclaimed from the system, is also sustained by Paragraph VIII of the State Contract (Rec. p. 50). There again the contractor is required to sell shares and interests in the system to *all* persons entering Carey Act lands, to purchasers of State lands, and to owners of other lands under the system, the only limitation being that the land must be susceptible of irrigation from the system; and each purchaser is to be given "the right of possession and enjoyment" of his interest. This paragraph also states that each share or water right shall represent "a carrying capacity" sufficient to deliver water at the "rate" of one-hundredth of a cubic foot per second, and that each share or water right shall also represent "a proportionate interest" in the canals, water rights and franchises, based upon the number of shares finally sold.

The declarations or statements regarding capacity and what a share or interest represents are all based upon the plan of irrigating 150,000 acres by the appropriation made for this project. Based upon that plan the various definitions of a share or interest mean one and the same thing. That is to say, each acre of land would be entitled to $1/150,000$ part of the appropriation, which could not exceed $1/100$ cubic foot per second for each acre, but there was no guarantee either on the part of the State or on the part of the contractor that Providence would provide that amount of water each and every year as long as water could be beneficially used upon the lands under the project, or that the contractor would do so if others failed. The statements in this paragraph, insofar as they relate to the contractor, are important only as they again fix, in general terms, the capacity of the canals and prohibit the contractor from discriminating between applicants for the purchase of shares or interests in the system.

The latter part of the paragraph (Rec. p. 52) permits the contractor to sell "shares" or "water rights" on terms more favorable than one-fifth in cash at the time of purchase and the balance in five annual installments, but this option cannot be construed to permit the contractor to enlarge upon what a share or water right shall represent. To do so would defeat the very purpose of the contract and would confine the system to a smaller acreage than the State proposed to reclaim under this project. The limitation that the contractor shall not sell "beyond the

carrying capacity of the canal or in excess of the appropriation of water therefor," does not mean that the State has not determined the acreage that may be reclaimed from this project. It means simply that the system must have a carrying capacity of 1/100 of a cubic foot per second for each acre, and that the sales shall not exceed 150,000 acres, which is the limit of "the appropriation of water therefor." The term "appropriation" as used in this sentence means the permit for 1,500 second feet; it does not mean an unknown and varying quantity of water flowing in a stream, the amount of which is to be determined in the future after the lands have been entered, settled upon and improved.

Paragraph IX of the State Contract provides that the Operating Company shall have a capitalization of 150,000 shares, "which amount is intended to represent one share for each acre of land which may be hereafter irrigated from said canal," thus again emphasizing the acreage to be reclaimed and what each share or water right represents.

Paragraph X simply relates to the form of certificate to be issued by the Operating Company. It is not a covenant or agreement on the part of either the contractor or the State as to the amount of water available. The Operating Company is the permanent organization that is to operate, control and hold title to the canals and water rights. Each settler will hold certificates of stock in that corporation as permanent evidence of his interest in the system. The State having provided for the incorporation of that

Company, states briefly in this paragraph what shall be stated in the certificates of stock which the Operating Company shall issue to the settlers. It could be of no importance to the contractor that constructs the system what sort of certificates the Operating Company gave the settlers. Ordinarily it would be a matter for the settlers themselves to determine when they formed the corporation, but in this case the State provided that the corporation should be formed before there were any settlers, and hence the State Board undertook to determine what would ordinarily be determined by the incorporators or directors. There is nothing in this paragraph inconsistent with the balance of the contract that each settler shall receive an undivided and proportionate interest in the system, which if completed so as to irrigate 150,000 acres would entitle each acre of land to 1/150,000 of the water appropriation for the project.

As a matter of fact, however, as the project now stands, each acre of land receives a far larger percentage of the appropriation, for the total acreage sold is 73,348 acres and no further sales are being made, hence each settler receives more than twice the proportion of the water appropriation originally contemplated, and the capacity of the system is far in excess of what the contract provides it should be per acre (Rec. pp. 192, 220).

We submit, therefore, that there is nothing in the State Contract that conflicts with either the Federal Act or the laws of the State relating to projects of this kind, or that promises or undertakes to give to

a settler more than his proportionate part or interest in the canal system and water rights dedicated to the project.

THE SETTLERS' CONTRACT.

The settlers' contract so repeatedly states, reiterates and emphasizes that it is made *pursuant* to the terms of the State contract and the laws of the State under which said contract was made, that there can be no basis for the contention that the settlers' contract gives to the settler a larger or different interest than the State contract provides he shall receive. This contract states (Rec. p. 63) that the State Board has notified the contractor that it may proceed to sell "pursuant to law and to the terms of said contract with the State." This expression is repeated on page 64.

This contract sets out the form of the certificate of the Operating Company, and it contains the provisions required which the State contract provided should be therein set out. It is true that the certificate states that "this certificate entitles the owner hereof to receive 1/100 of a cubic foot of water per acre per second of time for the following described land," but it also says that this shall be "in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land & Water Company," and that it entitles the owner "to a proportionate interest in the dam, canal, water rights, and other rights and franchises" of the Land and Water Company, based upon the number of

shares finally sold "in accordance with the said contract between the said Company and the State of Idaho."

We submit that there is nothing in the contract that can upon any possible theory be construed as a guarantee on the part of the contractor that the Operating Company will continue for all time to deliver to the land owners 1/100 of a cubic foot of water per acre. The absurdity of such contention is manifest when we remember that the settlers are the stockholders of the Operating Company and the contractor has no control over it, except for a very short period or until a majority of the settlers have paid as much as 35% of their deferred payments. The settlers' contract, however, emphasizes the fact that it is made pursuant to the terms of the State contract, and we respectfully submit that nothing could legally be inserted in the contract between the contractor and the settler that would modify or vary the interest which the settler acquires in the system or the amount of water that he should receive per acre. Insofar as these matters are concerned the State contract is the fundamental law and anything in the settlers' contract in conflict therewith would necessarily be void and ineffectual.

For the reasons stated, the construction which the District Court placed upon the settlers' contract not only conflicts with the provisions of the State contract, but with the provisions of the laws of the State and the Federal Acts relating to Carey Act projects. The settlers' contract is comparatively unimportant

in this litigation, for it must necessarily yield to the State contract on the matters here involved. Contracts similar to the ones now before the Court, and also the laws of the State and the Federal Acts relating thereto, have been repeatedly before the Supreme Court of the State of Idaho and have been construed by that Court, and the decisions of the Supreme Court of the State will be followed by the Federal Courts in matters of local law and the construction of contracts like those now before the Court. We pass, therefore, to a consideration of the Idaho decisions.

THE IDAHO DECISIONS.

The questions here involved first came squarely before the Supreme Court of Idaho in *State ex rel. West v. Twin Falls Canal Co.*, 21 Ida. 410, 121 Pac. 1039. The Twin Falls Canal Company was the operating company under the original Twin Falls Carey Act project constructed by the Twin Falls Land and Water Company under its contract with the State of Idaho, a copy of which is set out in full, pp. 337 to 457 of the record in this case. The case arose after the contractor had completed the system and after the operating company had taken possession and control thereof. West, a purchaser of State lands under the project, made application to the operating company for water for the irrigation of his lands, offering to purchase upon the terms of the State Contract. The operating company declined to sell him any interest in the system or to furnish him any water because it contended the system was already over-sold and that it could not deliver to the settlers who had

already acquired rights in the system the amount of water specified in the State Contract or in the settlers' contracts. West made the same contention that we are making here, that each purchaser was only entitled to an undivided proportionate interest in the system and water rights appurtenant thereto and that the water appropriation had been dedicated to the entire project and for the benefit of all the lands. The Court explains the procedure in Idaho relative to Carey Act projects and the reason for providing for an operating company to assume the management of the system when the works have been completed by the contractor. Referring to the particular questions here involved, the Court says:

“By the terms of the contract between the State and the Land and Water Company, *the water appropriated was dedicated to the lands segregated and to the school lands within the segregation.*” (Our italics.)

Referring to the provision of Sec. 1615 of the Idaho Revised Codes, which says that the perpetual water rights mentioned in said section shall “embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto,” the Court says:

“The term ‘rights and franchises,’ as used in that section, means water rights as well as all other rights, including dams, canals, ditches, laterals, etc., and the interest which the purchaser of a water right has, not only in the irrigation

works, but in the water rights as defined by that section of the statute, is a 'proportionate interest.' Thus said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works."

The Court refers to the fact that it is the duty of the State Engineer and the Land Board to determine whether there is sufficient unappropriated water in the source of supply, and if the Board passes favorably upon the supply and considers favorably the plan of reclamation proposed by the contractor, it may enter into a contract for the construction of the necessary works of reclamation. In reference to the construction work, the Court says:

"Under the provisions of the statute, the completing of said works is supervised by the State, and ultimately the works must be turned over to the settlers, *thereby providing a kind of municipal ownership.*

"Under the rules and regulations of the Land Board, adopted October 16, 1909, the relation of the builder of the works to the project is set forth as follows: 'The company entering into this contract with the State is related to the undertaking simply as a construction company, whose duty it will be under the provisions of the State law and the terms of the contract to build a canal under the supervision of the State, the money spent in such construction being secured by the land which the canal is designed to irrigate.' "

Taking up the matter as to where the settlers' water should be measured, the Court quotes with approval from one of its prior decisions as follows:

“Under the law, water of all claimants must be measured at the point where such water is diverted from the natural channel of the stream from which it is taken. This is a matter of necessity demanded by public policy. It is the policy of the law to prevent the wasting of water.”

There, as here, it was contended that the water should be measured at the point of delivery into the consumers' lateral. In that case the Board had dedicated or set aside 3,000 cu. ft. per second for the irrigation of 240,000 acres. The provisions of the contract relative to the delivery of water to the settlers were substantially the same as they are in the case at bar. The Court, however, held, that in view of the fact that a certain amount of water had been dedicated to a certain acreage, the loss and evaporation would have to be distributed pro rata over the acreage as there was no provision in the contract for diverting from the river any excess to cover such losses. The decision, therefore, is directly contrary to the decision of the District Court in the case at bar, which holds that the water shall be measured “at the points of delivery from the system into the consumers' laterals.” (Rec. p. 393.) In fact, it is apparent that the learned District Judge had not considered the decisions of the Idaho Supreme Court in either the West case or the other cases that we shall hereafter refer to.

Referring to that part of the State Contract wherein the contractor agreed "to sell or cause to be sold to the person or persons filing upon any of the lands herein described, or to the owner of the other lands not described herein but susceptible of irrigation from its said canal system," the Court says: "This paragraph of the contract is a specific promise to sell water for State lands." In other words, the Court construed the contract to mean that the contractor had no discretion in the matter of restricting the sale of water rights to a lesser acreage than that which was susceptible of irrigation from the project and for the irrigation of which the water appropriation had been dedicated by the State.

Referring to the provisions of the certificates of stock of the operating company which in that case provided that the purchaser was entitled to one-eighthieth of a cubic foot per second continuous flow, the Court said:

"The provisions to be contained in said certificates of stock, above quoted, if taken alone, may be a little obscure; but taking the whole contract together, it does not provide for a constant or continuous flow to each 80-acre tract of a cubic foot of water per second of time, for, as above shown, said water right and system were not sufficient to deliver a constant flow of that amount of water after deducting the loss of water occasioned by seepage and evaporation. * * *

"Said provision clearly contemplates that the irrigators shall use said water 'in turn' or 'by

rotation', if that method will best protect and serve the interests of all users of water from that system."

Referring to the matter of determining the water supply before the segregation is made and the construction of the project is undertaken, the Court says:

"The Land Department of the United States must have considered those facts before it came to the conclusion that said amount of water was sufficient to reclaim said land. If it had not come to that conclusion, it would not have segregated the land included in said project on the showing made by the State. The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not have entered into said contract for the construction of said irrigation system. And, further, there is nothing in the record to show that said amount of water is not amply sufficient to properly irrigate all of said land if used in turn by the owners of the land or under a proper system of rotation."

The last part of the above quotation would seem to settle the proposition that it is the amount required rather than the amount stated in the contract that should be considered in cases of this character, and that the water user has no right to complain even though he does not receive the amount specified in the contract if he is nevertheless receiv-

ing sufficient to properly irrigate his land under a proper system of rotation.

Referring to the provision of the contract that the contractor should not sell shares or water rights in excess of the carrying capacity of the system or the appropriation made for the project, the Court says:

“That provision of the contract prohibits water rights or shares to be dedicated to any of the lands included within said project or sold for any lands beyond the carrying capacity of the ditch, and also in excess of the appropriation of said 3,000 second feet of water. It prohibits *the sale of more than one-eightieth of a second foot per acre to any of said lands, and also prohibits the sale of any part of said 3,000 second feet of water for the irrigation of lands outside of said project, as said contract clearly contemplates that said appropriation of water shall be devoted exclusively to the irrigation of lands within said project.*” Our italics).

Referring to the contention of the operating company that each settler was entitled to a continuous flow and that he could not receive one-eightieth of a cubic foot per second if any more water rights or shares were sold in the system, the Court says:

“There is nothing in that contention. Under the contract the interest of the settler is a proportionate interest in the entire canal system and the water appropriation. *If there is a loss, he must stand his proportionate part.* 3,000 second

feet of water were appropriated for 240,000 acres of land, or one-eightieth of a second foot per acre at the point of diversion. * * * The maximum amount of water provided for is one-eightieth of a second foot per acre. The user's right to water up to the maximum of $\frac{5}{8}$ of an inch per acre depends upon his actual necessity for the production of his crops, and the only method under the contract by which he could receive that amount would be by the rotation system.

"It is suggested by counsel that the settler should be given substance under this contract and not shadow; water and not carrying capacity in the canal system. The settler is entitled to receive just what the contract entitles him to receive,—nothing more, nothing less."

The court then discusses the advantages and merits of the rotation system, and shows why an irrigation system should have a capacity in excess of the amount of water it can deliver by continuous flow, answering fully and completely the opinion of the learned District Judge in this case on that point. After showing that by the rotation system there would probably be sufficient water for all, the court says:

"And even if there is not, under the provisions of said contract, *each land owner owns a proportionate part of said irrigation system and said water, and in times of shortage he is only enti-*

tled to receive his proportionate share of the water. The water supply for said system has been decided by the State authorities to be sufficient to amply irrigate all of the land within said project, and there is nothing in the record that contravenes that view. * * * And further, under said contract, the settler owns a proportionate share of said canal system and the water appropriated for the irrigation of the land within said project.” (Our italics).

A rehearing was granted, but the Court declined to change its views.

The opinion was again approved in a similar case involving the same defendant, on September 25, 1915, in the case of *State, et al., v. Twin Falls Canal Company*, 151 Pac. 1013. In the latter case, the Court, after stating the facts and referring to its prior decision, says:

“These facts were fully considered by the court, and the conclusion was reached that they did not constitute the defense to plaintiff’s cause of action.

“Upon the authority of the said case of *State v. Twin Falls Canal Co.*, supra, we conclude that the answer in this case does not state facts sufficient to constitute a defense.”

Some phases of the questions here involved were before the Idaho Supreme Court in the case of *Idaho Irrigation Co. vs. Pew*, 26 Ida. 272, 141 Pac. 1099. The questions arose on demurrer to a complaint to

foreclose the lien under a settler's contract. The Court considered what was included in a Carey Act lien, and it was held that under the Federal Act, as well as the State law, the lien was for construction and not for the sale of water. After quoting from the Act of Congress of 1896, amending the Carey Act, the Court says:

“ ‘This actual cost of reclamation’ in any given case was evidently intended by the act to be determined by the State, and that determination would at least constitute *prima facie* proof that the amount the State allowed the company to charge and collect for a water right was the ‘actual cost’ within the purview of the Act of Congress. The Carey Act authorizes the State itself to reclaim the land or to contract with a corporation to do so. The presumption must be that the State will act fairly and justly, and that the price it permits to be charged and collected is clearly within the direction and authority of the Congressional Act. * * *

“Before the State and the construction company can enter into any contract for the reclamation of a tract of land, they must have agreed upon the estimated cost of construction and the corresponding price to be charged for water rights, in order to defray such cost. That agreement as to cost is the basis of the contract between the company and the State. Again, when the company first comes into relation with the settler, it must have contractual assurance from

him that he will reimburse it for his share of this estimated cost, and the settler on the other hand must be safe-guarded by a fixed contract price for the water right if he enters upon the land. This arrangement impresses us as not only unavoidable in the very nature of the conditions existing, but as eminently fair and just to all parties. If the prospective settler considers the estimated cost of construction excessive he need not contract for the purchase of water rights under that project. He is under no compulsion to contract with the company at all. He is not dependent on the company when he makes his contract with it, for the law does not permit him to enter the land before he makes the water right contract."

Some of these questions were before the Court in *Bennett vs. Twin Falls Northside Land & Water Co.*, 27 Idaho 643, 150 Pac. 336. The Court there says:

"Under the constitution and laws of the State the ownership of the *corpus* of the water is in the State and it could not be successfully contended that anyone could make 'dedication' of something not owned by him. * * *

"Under the provisions of Section 3240, Revised Codes, it is declared that all of the waters of the State when flowing in their natural channels, including the waters in all natural springs and lakes, within the boundaries of the State, are the property of the State. * * *"

The Court, referring to the relation of the contractor to the State and the settlers, says:

“Said Land and Water Company is simply a Carey Act construction company, formed only for the purpose of acquiring a right to the use of water which it temporarily holds, in a certain sense, as trustee for the prospective entryman, and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land and Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of land. In fact, it would be impossible for it to perfect the water right, as it holds no land upon which the water could be used, and it only complies with the legal forms in the initiation of the water rights for and on behalf of the prospective settlers, while the settlers, by an application of the water to a beneficial use, perfects the water right and keeps and maintains the same alive, or prevents, by the use of water, such right from lapsing.”

The last expression of the Idaho Supreme Court on the subject is in the case of *Idaho Irrigation Co. v. Lincoln Co.*, 152 Pac. 1058. The question there was as to whether the contractor or construction company was liable for the payment of taxes on the system before it had been turned over to the operating company or settlers. The Court in holding it was not liable for taxes, says:

“It is clear from the provisions of said Carey Act and the amendments thereto and the statutes of the State applicable to said Act that companies like the defendant are treated by the State as, and are in effect nothing but, construction companies engaged in constructing irrigation works under contract with the State, and their remuneration is limited by the provisions of the Carey Act and the provisions of Section 1629, Rev. Codes, to the actual cost of construction and the necessary expenses of reclamation and reasonable interest thereon.

“It has been the custom of the State Land Board at the time a contract is entered into to fix a sum which shall represent such actual cost of construction, and this practice has been upheld by this Court in the case of Idaho Irr. Co., Ltd., v. Pew, 26 Idaho 272, 141 Pac. 1099. It is apparent that the law does not intend that profit shall accrue to the construction company, and it is clear that the construction company is not the owner of the works constructed by it nor of the water right connected therewith, for under the provisions of said Section 1629 the construction company is given a first and prior lien on the water right and land upon which the said water is used for all deferred payments for such water right, and under no reasonable construction of such law can it be held that the construction company is the owner of either the water right or the system, but is only given the right to sell them

for the purpose of reimbursing it for the cost of construction.

“The only means of remunerating the construction company is by the sale of the water rights. The State Land Board fixes the price per acre to be charged for such water rights by dividing the cost of reclaiming the land by the number of acres to be reclaimed, and when all of the water rights connected with such system have been disposed of, the construction company has, at least in theory, been reimbursed for its outlay, provided that purchasers of such water rights pay the purchase price for them. The water rights unsold cannot be considered in the ordinary sense of assets of the construction company, since water rights remaining unsold represent rather a liability of the construction company which can only be met by the sale of the water rights as provided by law.”

Referring to the interest of the construction company in the works and water rights, the Court says:

“The construction company’s interest in the reservoirs, dams, water rights, etc., is represented by the lien provided by law to cover the *cost of construction*. Said Section 1629 authorizes the State to create a lien to cover the cost of construction, with interest, and this lien represents the amount of money which the company has expended on which it has not received any return from those purchasing water rights.”

It is settled by these decisions, and the law could not be construed otherwise, that the construction company receives no pay for the water; that its remuneration is entirely for the structures which it builds and the supplies and material which it furnishes. It is referred to in the laws, in the contracts, and in the Court's decisions as the contractor or construction company. When it contracts with the State for the building of certain works, the cost of such works are estimated as nearly as practical by all parties; the State Engineer reports thereon and acts as the advisor of the State Board of Land Commissioners. After the cost of construction has been determined it then becomes equally important to determine the acreage that may be irrigated from the system, and with this data before them the parties proceed to ascertain the price per share or acre that should be charged for water rights or shares in the system. The plan of determining the price per acre or the price of shares or water rights shows conclusively that the Board must determine before the State contract is entered into, the acreage to be reclaimed from the system. If the acreage is large the cost per acre will be less. If the acreage is to be small the price per acre must be proportionately increased.

On every hand there is evidence and confirmatory proof of the correctness of our position that the water appropriation is dedicated for the entire project and that there is no authority in the construction company any more than there would be in other

contractors to change the plans after the contract has been let. Indeed, it is required to give a large bond "for the faithful performance of the provisions of the contract with the State" (Section 1621).

We shall next consider briefly the decision of the District Court in this case.

THE DECISION OF THE UNITED STATES DISTRICT COURT.

We shall not undertake to review in detail the decision of the learned District Judge. Substantially all that has already been said regarding the construction of the State and settlers' contract is in answer to the construction placed on those contracts by the District Court. The decision rests almost wholly upon the form of certificate issued by the Salmon River Canal Company and upon what the Court assumes must have been the moving cause for the settlers to enter into contracts with the Land and Water Company. The opinion does not refer to either the State or Federal laws, or to the decisions of the Supreme Court of the State construing similar contracts. The Court apparently considers a number of matters wholly outside of all contracts but from which the Court concluded, without any evidence to sustain it, that the settlers must have believed they would receive a certain specified amount of water.

The Court says:

"Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the company would give no promise of a sufficient supply, no

assurance of any specific quantity, no undertaking that any given amount would be available for the project as a whole, and no guaranteed limit upon the number of acres for which water rights would be sold."

That the Court had an imperfect view of the situation is apparent. Substantially every declaration or statement made in the foregoing quotation rests upon an erroneous assumption and is unsupported by any proof in the record. The Court based its decision upon the erroneous assumption that the company was the only source of information available to the settler or purchaser. It erroneously assumed that the construction company was the persuasive power that induced the settler to buy, when the record shows that none of the plaintiffs in this case had had any dealings whatever with the construction company, but purchased from others after the condition of the water supply was substantially as well known throughout the community and by the public generally as it was at the time of the trial.

The Court erroneously assumed that these practical men of affairs, determined, as it says, to know that they would get water and not simply promises or indefinite and undivided interests, ignored or passed by all public, reliable and disinterested sources of information and went direct to the construction company—the one concern that was the most interested of all in selling water rights, and that they accepted the expressions in the settlers' contract as a positive guaranty that the water supply was sufficient.

The settlers must be given credit for having acted more intelligently than the Court assumes they did in this case. The settlers knew, and the contracts which they signed so stated, that:

1. The irrigation project had been found feasible by the Federal Government and that the lands had been segregated from the public domain for reclamation from this project because the water supply was deemed insufficient.

2. That the State Board of Land Commissioners, acting for the State of Idaho, had applied for the segregation of the lands and contracted for the construction of the project after the State Engineer had reported that the water supply was sufficient and the irrigation works of the kind and character required to properly reclaim the lands, and they knew that the State Board would not have entered into the contract with the construction company if it had not believed that the available water was sufficient for the proper reclamation of the lands.

3. That the project had been approved by both the State and Federal authorities.

4. That faith and confidence could well be placed in the project because the published reports of the Land Board contained a rule and regulation stating that (Rule 11):

“It will be the policy of the Board to guard well the interests of the settler and to that end holds that the ‘inauguration of work by the contractor,’ referred to in Section 1625 of the Revised Codes, shall mean that proper arrangements shall have

been made for carrying on the work of construction, and that the actual work of construction shall have begun on a scale reasonably commensurate with the magnitude of the undertaking before any portion of the land will be declared open for public entry."

That the lands were thrown open for entry under a notice published by the State Board under Section 1625 of the Idaho Revised Codes, which provided that:

"Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the Board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State capital, for a period of four weeks, to give notice that said land, or any part thereof, as the Board in its discretion may deem is for the best interest of the State, is open for settlement, the price for which the said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works."

The settlers primarily wanted land, the water without land being of no value to them, and having selected the land that they desired to enter, they were advised by the rules of the Board and the statutes of the State that they could not file upon such land

until they had entered into a contract with the construction company for shares or interests in the system that would give them a water right sufficient to reclaim the land. The published notice of the State Board under Section 1625, *supra*, stated "the price for which such land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works." The settlers, therefore, simply went to the construction company as part of the routine required in perfecting the entry and asked for a contract. There was nothing to negotiate about. The price and terms of purchase were fixed and were alike to all.

The prospective purchaser was in the vicinity of the project. He could investigate for himself or obtain information from disinterested parties in the community, and we submit that the only reasonable conclusion that can be drawn from the circumstances and facts surrounding the signing up of settlers' contracts is that the purchasers were influenced by the matters set forth above, and not by the statements in the water contracts.

The Court erroneously assumed that there was no *limit* to the number of shares or water rights that could be sold when as a matter of fact the State contract repeatedly limits the amount to 150,000 acres. That was the limit of the capitalization of the operating company; that was the limit of irrigable land under the project as shown by the report of the State Engineer; that was the limit of the water appropriation.

It is incredible that any purchaser should have acted upon the theory or along the lines suggested by the District Court. Those familiar with practical affairs know from experience that persons buying water rights are not so easily satisfied. What possible reason is there for believing that the prospective purchaser would not be influenced by the matters set forth above, but would accept in lieu of the information available from those sources and the assurances afforded by those facts, a vague promise of a construction company, which, upon the Court's theory, was making promises far beyond its financial responsibility. There is no allegation or proof that the settlers relied upon or had any reason for relying upon the statements of the construction company, or that they believed any of its representations. The fact is undeniable that the purchasers and the seller were strangers to each other and were dealing at arms' length.

It is incomprehensible that any large number of persons should have entered into contracts upon the theory suggested in the opinion of the learned District Judge. The Court is clearly wrong when it says that the purchasers accepted as satisfactory and sufficient evidence of the sufficiency of the water supply what the Supreme Court of the State of Idaho in the West case called the "obscure" language of the stock certificate of the Salmon River Canal Company, contradicted in so many places by the positive provisions of the State contract. If that is the only assurance the settlers had, it is strange, to say the least, that

none of them should have demanded a bond or undertaking from the contractor to make good this alleged ambiguous guarantee. In the language of the learned District Judge, his reasoning on this point "is not convincing."

It seems highly improbable that any large number of people would have signed the settlers' contracts had they not had some other assurance concerning the water supply than the meager statements contained in the settlers' contract. It would seem that they would at least have demanded positive and specific language expressing the obligations of the contractor to furnish or deliver what they contend the contract provided they should have. Had the parties intended to provide for matters of that kind, it would have been a simple matter to have expressed it in language that could not have been misunderstood. In fact, it is difficult to see how it could be stated in language that would be less expressive of such an intention.

The conclusions of the District Judge that the contractor undertook to guarantee the water supply are so inconsistent with the public policy of the State and of the West generally in the construction of irrigation works and the reclamation of arid lands, that the construction which the Court placed on the contract ought not to be accepted unless the language be so clear and definite as to permit of no other construction. Under the Court's theory the average or minimum flow of a stream for a series of years is wholly unimportant in determining the area that

may be reclaimed, or the feasibility of an irrigation project. Upon the Court's theory the lowest or minimum flow of the stream is the only matter to be considered and that would determine the limit of reclamation of arid lands, for obviously no contractor or responsible concern would knowingly enter into obligations that it could not fulfill and that would subject it to damages if it failed to do so. Hence, the limitation of irrigation development would be based on a water supply somewhat under the minimum flow of the stream—there would be a factor of safety beyond which it would not be considered safe to go.

Were the theory of the District Judge to be applied to projects generally, much of the land that is now being reclaimed in all parts of the West would be unreclaimed. It is safe to assume that the State Board of Land Commissioners did not intend to develop the State upon that theory and that they did not undertake this or any other Carey Act project upon such theory. The Board was attempting to find the largest acreage that it was practicable to reclaim from the available water, appreciating the fact that late in the season or in years of drought there might be less water than the crops would require in order to yield the maximum returns, but the loss when distributed equitably over the project would not be great as to any one individual, and the farming would still be profitable.

Under the statutes of the State, the contractor gives a bond to complete the construction of the works in accordance with the State Contract, but he gives

no bond to protect the settlers under the alleged guaranty of the water supply. The construction company has no control over the project after it is completed. Its operation and control is in the hands of the operating company, the stock of which is owned by the settlers. Is it at all reasonable to assume that any responsible concern would assume the obligation of delivering water to the settlers when it has no control of the system? Is it reasonable to assume that the settlers would attach any importance or value to any promise or guaranty of that kind from a concern that is not to have control of the system, a concern that is created and organized solely for the purpose of constructing the works, after which it dissolves or moves on? The learned District Judge assumes that settlers are far more credulous than human experience has shown them to be. No one will purchase a parcel of land, however small and of which he may obtain immediate possession, simply upon the strength of the warranty of the seller. He will insist upon an abstract of title, and if he finds the title imperfect he will refuse to buy, regardless of the offer of the seller to warrant the title.

It should be noted that in none of the contracts are there any provisions limiting the alleged guaranty of the Land and Water Company. It is unlimited both as to time and causes. It is reasonable to suppose that had there been any intention to make any guaranty whatever, there would be some provision as to the time it should run, or the furnishing of a bond, or the giving of some security to make the

guaranty good, and some restrictions as to the causes against which the contractor would not guarantee the delivery of water.

Without extending the argument further on this point, we say again that the conclusions of the District Court seem to us absolutely untenable when all the contracts, statutes and the surrounding facts and circumstances are taken into consideration.

The District Court admitted in evidence a printed circular over the objections of appellant (Plaintiff's Exhibit 17, Rec. pp. 147-156). The circular was not identified by anyone except the plaintiff, Mr. Sims, who stated that he received it from his father. There is no evidence that the Land and Water Company, or anyone connected with it, had ever seen the circular, or that anyone purchased any shares or water rights from the company because of anything contained in the circular. Mr. Sims, one of the plaintiffs and apparently the only person who had seen the circular, purchased his land from his father. (Rec. p. 164.) The circular on its face shows that it was issued some time after the lands were thrown open for entry, for it recites at the very beginning that "70,000 acres of this land were filed on during the month of June," hence not over 3,000 acres could possibly have been affected by anything contained in this circular; and in the absence of proof or evidence of any kind that anyone purchased shares or water rights from the company in reliance on the circular, we submit that it was entirely improper for the trial court to attach

any great importance to this circular or to anything therein contained.

What is stated in the circular in regard to the water supply is no stronger than the report of the State Engineer filed with the Board and is probably based on that report. We note, however, that the circular states (Rec. p. 148): "The Land Board advises and looks after the interest of the settlers." This was notice to proposed purchasers of the proper source of information concerning the project, the water supply, and the contracts.

The District Court excluded all evidence offered by the appellants tending to show that appellees were not injured and that they were receiving and would continue to receive all the water necessary for the proper irrigation of their land, and we pass now to a consideration of that question.

THE DUTY OF WATER WAS AN ISSUE UNDER THE PLEADINGS AND THE STATUTES.

The Court declined in this case to admit any evidence relative to the duty of water or the amount of water required for the proper irrigation of the lands of complainants and other contract holders. The decree of the Court therefore rests upon the alleged violation of a contractual right without proof of substantial injury or damages—past, present, or prospective. The Court in effect held that it was immaterial whether complainants needed or could apply to a beneficial use the additional amount of water which they claimed they were entitled to receive under their contracts.

That the duty of water was an issue under the pleadings, we think sufficiently appears from even a cursory examination of the bill. In paragraph XIII (Rec. p. 16) it is alleged that there is a large loss in transportation and that the average supply after deducting such losses "is inadequate to irrigate the acreage entered upon under water contracts sold," and in the next paragraph (Rec. p. 17) it is alleged that at least $2\frac{3}{4}$ acre feet per acre *is and will continue to be necessary even though the most skillful, efficient and beneficial methods of use and conservation be used and any less amount will be wholly insufficient to raise ordinary agricultural crops, and will not enable the complainants and settlers upon said tract to comply with the said Carey Act regarding a permanent water supply to reclaim said land, or to enable them to farm or cultivate their said land profitably.*"

Similar allegations will be found throughout the bill. These allegations were denied by the answers filed by appellants, and to meet the issues thus presented, appellants at great expense brought from a distance a large number of witnesses—some fourteen or fifteen in all—to testify as to the amount of water required per acre under the project here in question. The qualification of the witnesses to furnish intelligent and reliable testimony upon this point cannot be questioned. We think we are entirely justified in saying that never before in a water case had so many witnesses, qualified by education, experience and scientific investigations, been in Court for the pur-

pose of furnishing intelligent and reliable information on the duty of water. The testimony of these witnesses would have been to the effect that plaintiffs were receiving and would continue to receive, except possibly in years of unusual drought, the amount of water necessary for the proper reclamation of their lands. The testimony of the witnesses which were called for this purpose was taken by way of depositions and is set forth in volume 2 of the record in this case, and we particularly urge the Court to examine the interesting and instructive testimony of these witnesses.

We desire particularly to call attention to the testimony of J. S. Welch (Rec. vol. 2, pp. 26-44). Mr. Welch is in charge of the Gooding Experiment Station in Idaho, where the soil and climate are substantially the same as on the Salmon river project. He gives the results obtained by varying amounts of water on different classes of crops, the purpose being to obtain the economic duty of water that should be insisted upon by the State in order to obtain the largest return from its water resources.

The results obtained by Mr. Welch are substantially the same as the results obtained by Doctor Widtsoe, of the Utah Agricultural College, and set forth in his recent book entitled "The Principles of Irrigation Practice." We shall quote briefly from Doctor Widtsoe's book as that may not be as convenient for the examination of the Court as the testimony on this subject in volume 2 of the record. On page 250, Doctor Widtsoe sets out a table showing

“yields of wheat with varying quantities of irrigation water,” from which it appears that with 10 acre inches ($\frac{5}{6}$ of an acre foot) 43.53 bushels of grain were obtained; with 15 acre inches ($1\frac{1}{4}$ acre feet) 45.70 bushels were produced; with 25 acre inches, 46.46 bushels were produced; thus showing that by increasing the amount of water from 10 acre inches to 25 acre inches, it increased the production by less than three bushels per acre, and that if the 25 acre inches instead of being applied to one acre where they produced 46.46 bushels had been applied to two acres—10 acre inches on one and 15 on the other—they would have produced 89.24 bushels.

On page 260, the results in the yield of corn with varying quantities of irrigation water are given. These results show that with 10 acre inches of water to an acre, 89.52 bushels were obtained; with 15 acre inches, 93.93 bushels; with 20 acre inches, 91.58 bushels; with 25 acre inches, 99.16 bushels; with 30 acre inches, 97.12 bushels; that as the amount of water was increased, the yield was decreased. The results again demonstrated that as the water was increased beyond 15 acre inches per acre, the yield either decreased or else the increase was wholly out of proportion to the value of the water applied, and again showing clearly that a wise public policy demanded that the water be extended over a larger area and a lesser amount used per acre than what has been the custom of the past in many parts of the West. Similar results were obtained in the investigations on the yield of alfalfa.

Probably the most learned and complete discussion of this subject will be found in the testimony of C. C. Thom, of the Washington State College of Agriculture, Pullman, Washington. Mr. Thom had spent considerable time on the Salmon River tract investigating the soil and its ability to hold or retain water. Mr. Thom had also carried on investigations in other parts of the country and made many scientific experiments of an interesting character, and we desire particularly to direct the attention of the Court to his testimony. (Rec., vol. 2, pp. 92 to 148.) Mr. Thom discusses the function of bacteria in plant growth, and shows (Rec. p. 102) that plant growth is in proportion to bacterial activity; that with 20% of moisture in the soil, bacterial activity is at its highest or greatest efficiency, which he calls 100%; that with 25% of moisture in the soil, bacterial activity is only 48% as great as when the per cent. of moisture was 20; that as the amount of moisture increases beyond 20%, bacterial activity decreases, and when the per cent of moisture reaches 35, bacterial activity absolutely ceases. Mr. Thom further shows the amount of water required to produce a pound of corn, or a pound of wheat, or a pound of potatoes, and these determinations are made in a way that their correctness cannot be disputed, and from the results obtained the amount of water required per acre for the various kinds of crops can be determined with a degree of accuracy not heretofore deemed possible.

Testimony was offered but excluded, except as taken by way of deposition and included in volume 2,

to show that there is grave danger of damaging the land on the Salmon tract by the use of more water than is necessary, that necessity for drainage already appears, and that the damaging results of over-irrigation can already be noted. (Rec. vol. 2, pp. 117-120; testimony of W. G. Sloan, Rec. vol. 2, pp. 63-76; and testimony of J. C. Wheelon, Rec. vol. 2, pp. 44-63.)

We need cite no authorities to the proposition that under the laws of Idaho and other States in the arid West, no one is permitted to divert or use more water than his necessities may require. The views of the courts and the legislatures of the several States on this point have been so frequently expressed and are so well known to this Court that we shall not encumber this already lengthy brief by excerpts from them. The legislature of the State of Idaho has forcibly expressed itself on this subject in Sec. 3240 of the Revised Codes, quoted in other parts of this brief.

Before any Court enters a decree that requires the cancellation or annulment of water contracts for the reclamation of land under a project that has been constructed by or under the supervision of the State authorities vested with power under the laws of the State to control the appropriation and distribution of water, the proof at least should show that injury of the gravest character will result to the settlers if the contracts be not cancelled and the project reduced to a smaller acreage than the State authorities had ordered should be reclaimed from such project. We submit, therefore, that the action of the District

Court, in declining to hear any evidence on the duty of water, or the need of the plaintiffs for an additional amount of water, before entering a decree of such drastic character, cannot be sustained. There are no equitable principles and no statutes governing the rights of water users and the distribution of water for beneficial purposes upon which the decree can be justified.

We desire next to consider the decree in its legal aspects or from the standpoint of the power of the Court to grant the relief which it did in this case.

INJUNCTION AGAINST ENFORCING COLLECTIONS ON
WATER CONTRACTS SHOULD NOT HAVE BEEN
GRANTED.

The decree herein restrained and enjoined the defendants, Twin Falls Salmon River Land & Water Company, Commonwealth Trust Company and A. C. Robinson, "from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the Court, that said water will be provided, or until the further order of this Court." (Trans. p. 394.)

It may be conceded that such relief is within the prayer of the bill (Trans. p. 38), and that two foreclosure suits on such contracts had already been brought and are still pending in the same Court,

while other foreclosure suits were in contemplation (Trans. p. 190). Nevertheless we submit that even upon the Court's construction of the settlers' contracts and the State contract and upon the facts as determined by the Court, plaintiffs were not entitled to this relief. The Court held that additional water could not be had (Trans. p. 305), and yet enjoined the defendants from collecting anything whatsoever on any of these water contracts until a water supply of one-hundredth of a cubic foot per second per acre continuous flow, or two and three-fourths acre feet per acre for the season be furnished the settlers.

The decision thus concedes that full compliance with all the settlers' contracts is a physical impossibility, and yet leaves the plaintiffs and the other settlers in whose behalf the action is brought in the possession of their proportionate or undivided interest in the system, and the water rights and water to the extent the company is able to furnish the same, and postpones indefinitely any collections by the company or its assigns for the undivided interests, shares, water and water rights actually furnished. Furthermore, the injunction prevents voluntary payments, as well as the enforcement of payment by foreclosure proceedings which in view of the lien granted by the contracts and the statutes would be the appropriate procedure and which the record shows was the procedure being followed.

The injunction quoted above contravenes at least three sound and well established principles of equity. They are:

1. Suits in equity will not be enjoined in a separate action because any defense that would justify such an injunction may be set up in the original action and the rights of the party fully protected.

2. Injunctions will not be granted against actions which are merely threatened or contemplated, because such actions may not be brought, and if brought it cannot be assumed that the rights of the parties seeking the injunction will be disregarded.

3. Equity will not enjoin the enforcement of a contract against a party who has all or part of what he contracted for, unless he gives up what he has received under the contract. These rules are amply sustained by the authorities and we will take them up in the order enumerated.

The first principle is thus stated in 22 Cyc. 810:

“It is a general rule that a party will not be restrained by injunction from proceeding with a suit in equity, because complainant’s equitable rights can be fully protected in that suit. An order to stay such suit should be obtained by an application in that Court itself. It follows that equity will not enjoin a suit to obtain an injunction, or an accounting, or a receiver. Nor will a foreclosure suit be enjoined for the relief of one who might obtain full relief in that suit itself.”

In 3 Elliott on Contracts, Sec. 2499, the author says:

“But an injunction will not be granted to stay proceedings in another equitable suit, either on application of the parties to the proceedings to

be restrained, their privies, or of strangers there-to, when the relief desired is procurable in the suit sought to be enjoined."

To the same effect are 16 A. & E. Encyc. of Law, 372, 4 Pomeroy Equity Jur., Sec. 1370-1372.

In High on Injunctions, Sec. 52, it is said:

"It is also a well established rule pertaining to that branch of the jurisdiction of equity under discussion, that an injunction will not be granted to stay proceedings in the same Court of Equity, either upon the application of parties to the proceedings sought to be enjoined, or of strangers to such proceedings, since a departure from the rule would lead to interminable litigation. A Court of Equity will not, therefore, enjoin the prosecution of another bill in equity or stay proceedings in another equitable action in the same Court, when no reason is shown why the party aggrieved cannot protect himself by interposing his defense in the former suit, since the defendant in the original suit can ordinarily avail himself of all his equities and defenses with full effect in that action."

In *Savage v. Allen*, 54 N. Y. 458, the Court states:

"The proposition that a separate action may, under our present system, be maintained to restrain by injunction the proceedings in another Court, between the same parties, where the relief sought in the latter suit may be obtained by a proper defense to the former one, has long since

been exploded, or, if not, should be without delay."

In another New York case, Wallack v. Society, 67 N. Y. 23, it is said:

"It would be an anomaly for a Court of Equity to issue an injunction restraining the defendant from applying to the same Court in the same matter."

In Waymire v. R. R. Co., 112 Cal. 646, 44 Pac. 1086, at page 1087, which was an action by stockholders to enjoin a foreclosure suit against the corporation, the Court made the following statement:

"It seems unaccountable that plaintiffs were advised that facts which would entitle them to a judgment nullifying the sale and transfer of the bonds, and perpetually enjoining the further prosecution of the action to foreclose the deed of trust, could not be made available as a defense to the foreclosure action. Even if the stockholders had demanded that the corporation institute an independent suit, such demand would have been properly refused, for the reason that, being the principal defendant in the suit to foreclose the deed of trust, *the corporation was not at liberty to institute an action in another Court, nor in the same Court, to enjoin further proceedings in the foreclosure action*, but was bound to plead the facts alleged in plaintiffs' complaint herein by answer, or, if necessary to aid the defense, by cross complaint, in the foreclosure action." (Our italics.)

The above rule has been applied in numerous cases, among which are the following:

Utah & N. R. Co. v. Crawford, 1 Ida. 770 (refusing injunction against suit to recover taxes).

Wolfe v. Titus, 124 Cal. 264, 56 Pac. 1042.

Mercantile Trust Co. v. B. & O. R. Co., 89 Fed. 606. (Before Circuit Judge Goff and District Judge Morris.)

Smith v. American Life Assur. Soc., 1 Clarke (N. Y.) 307.

Lane v. Clarke, 1 Clarke (N. Y.) 310.

Williams v. Brown, 126 N. C. 51; 37 S. E. 86.
(All refusing to enjoin separate actions for the foreclosure of mortgages.)

Wilson v. Jarvis, 19 Wis. 597 (refusing injunction against suit to quiet title).

Dayton v. Relf, 34 Wis. 86 (refusing injunction against foreclosure of tax title).

Robertson v. Montgomery Baseball Assn., 141 Ala. 348, 37 So. 388 (refusing to enjoin suit for injunction).

Frantz v. Masterson, 133 S. W. 740 (Tex. Civ. Apps.) (refusing to enjoin foreclosure of vendor's lien notes).

Jackson v. Stearns (Ore.), 84 Pac. 798, 5 L. R. A., N. S. 390 (refusing to enjoin client from settling action without attorney's consent).

See also:

State v. McGee, 15 S. D. 247, 88 N. W. 115.

Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768.

Dyckman v. Kernochan, 2 Paige Chanc. (N. Y.) 26.

Schell v. Erie Ry. Co., 51 Barb. 368.

Hall v. Fisher, 1 Barb. 53.

Redd v. Blandford, 54 Ga. 123.

In the present case the only actions pending or contemplated were actions for the foreclosure of the lien conferred by the contracts and the Carey Act upon the interest of the settlers in their water rights and the land held by them, and it would seem that no other form of action could be employed. In such action the matters set up in the bill of complainants and shown by their proof could undoubtedly be relied upon and could be given full effect, and it follows that under the rule established by the authorities we have just cited the settlers were not entitled to an injunction restraining the company and its assigns from enforcing any of the contracts.

In the second place equity will not enjoin actions which are merely threatened or contemplated.

In High on Injunctions, Sec. 64, it is said:

“It is to be observed, however, that mere apprehensions or fears on the part of the person seeking relief, that the defendant may institute actions against him in the future will not warrant a Court of Equity in enjoining the bringing of such actions.”

The basis of this rule is that no Court can presume that the same Court or another Court of competent jurisdiction will act improperly and deny the rights of a litigant, and as long as the action is merely contemplated or threatened it may never be brought. This doctrine is supported by the following cases:

Williams v. Brown, *supra*.

Wallack v. Society, 67 N. Y. 23.

Wilson v. Jarvis, 19 Wis. 597.

Wolfe v. Burke, 56 N. Y. 115.

Frantz v. Masterson, *supra*.

As in the cases last cited, it cannot be presumed here that if actions for the enforcement of the balance due on these water contracts were brought in the State Courts or in the Federal Court for the District of Idaho, the defense that the settlers had not received the full amount of water they were entitled to under their contracts would not be given its full effect, or that such settlers would be deprived of any substantial rights by being called upon to defend such actions.

The injunction granted by the Court herein is a very stringent one. It absolutely prevents the Company and the parties to whom these contracts have been assigned from enforcing them in any way until the amount of water the Court holds they are required to furnish has been supplied, and yet the Court recognizes that there is no source from which this amount of water can be secured. The effect of the injunction is to indefinitely postpone any collections

whatsoever on these contracts, and at the same time to leave the settlers in possession of everything that the Company can give them.

It would appear that the Court had in mind the possibility that some adjustment of the acreage for which contracts had been entered into could be made by the Company, but inasmuch as the action was brought in behalf of the named plaintiffs and all others similarly situated, which may be taken to include all the settlers on the project, it is difficult to see how any reduction could be made.

The situation thus presented seems closely analogous to cases where a vendor of land is unable to convey a perfect title to all the land he has agreed to convey. In such cases it is held that the vendee who seeks equity must do equity and if he is in possession of the property he cannot enjoin the collection of the balance of the purchase price. This question arose in the case of *Rischar v. Shields*, 26 Ida. 616, 145 Pac. 294, which was an action brought by the vendor of land to quiet title thereto on the ground that the vendees had forfeited their interest in the land by failure to make payments. The vendees filed answer and cross-complaint admitting the making of the contract and their failure to make payments, but alleging that plaintiff did not have title to a part of the land and could not furnish an abstract showing clear title in her. Defendants also sought by cross-complaint to recover back the money paid under the contract. The Court granted judgment for the plaintiff on the pleadings and on appeal it was said:

“Under a well-established rule of law, the allegations contained in said amended answer and cross-complaint were no defense to this action. The defendants ought to have tendered a compliance on their part with the provisions of said contract; they ought to have tendered the purchase price as stipulated and then if the plaintiff failed to produce an abstract of title showing a clear title and a warranty deed, as provided in the contract, they would have been in a position to recover back whatever damages they had sustained by reason of the plaintiff’s failure or inability to comply on her part with the provisions. The vendees could not retain possession of said land and refuse and neglect to pay the price when due, or offer to pay it, since the failure of title would not give them the right to continue in possession and also the right to recover back the payments made on the land.”

The case of *Frantz v. Masterson*, Tex. Civ. Apps., 133 S. W. 740, is clearly in point. It was an action to enjoin the foreclosure of vendor’s lien notes on the ground of a partial failure of title. There was no offer to pay the amount justly due, and the Court held that it could not prevent the collection of all the notes as long as plaintiffs were in possession of all the land, and thus postpone indefinitely any efforts of defendants in error to collect the whole or any portion of the amount of the notes.

In *Childs v. Lockett*, 107 La., 270, 31 S. W. 751, it was held that a purchaser in possession could not

enjoin proceedings to enforce payment of the price on the ground that he had obtained no title. The same rule was adhered to in *Burns v. Hamilton's Admr.*, 33 Ala. 210, 70 Am. Dec. 570.

In the present case it will be noted that the settlers are in default on installments already due under their contracts and make no offer to pay anything on these contracts. The evidence further shows that they have received a considerable amount of water during each of the years since water deliveries began, and under the decree entered herein the Company will be compelled to go on furnishing these settlers water without any compensation for such service or return on its investment; it is permitted to collect only the actual cost of delivering the water—simply annual maintenance—and this situation must continue indefinitely because the Court finds there is no further water to be had.

The Court has by its decree in effect confiscated the property of these appellants. Their interests in the water rights and irrigation system have vanished under the decision of the Court that the undivided interests already sold are in excess of the capacity of the system. Their only hope of return lies, therefore, in what they may be able to collect under their water contracts. The decree of the Court forbids them to collect until the acreage has been reduced and a large amount of water contracts cancelled and annulled. They are denied their constitutional right of due process of law and of access to the courts for the enforcement of their rights under the contracts. They have

not the power of Eminent Domain. They are required by the Court to accomplish the reduction by polite negotiations, and all that is necessary for the settlers to do in order to escape the payment of both principal and interest on their water contracts is to decline to resell to appellants sufficient water rights to bring the outstanding rights within the limit of the Court's order. Appellants in an attempt to reduce the acreage entitled to water will be purchasing at their peril, for if they fail to reduce the project sufficiently to meet the views of the Court, they have accomplished nothing by the money so expended. Verily, they are in a situation that would seem to demand relief.

These appellants (Commonwealth Trust Co. of Pittsburgh, Trustee, and A. C. Robinson) have done nothing to justify imposing such penalties upon them. They are guilty only of having furnished or of representing innocent bondholders who have furnished money that has been expended in the construction of the project and in giving to the settlers the water rights which they have and which they are now using. They advanced such money upon the faith of the Acts of Congress that the State was authorized to create a lien upon the public lands under the project in favor of those who advanced the money for construction, and upon the faith of the laws of the State expressly granting such lien, and upon the State Contract and contract of the purchasers specifying the amount of such lien per acre. It would seem that the most that plaintiffs can demand is that they be

given some recourse against the Land and Water Company, for the covenants which they claim it made and upon which the Court says they acted, are largely personal and can not go to the extent of impairing the lien created by the State and Federal laws above referred to.

For the reasons herein stated, we submit that the decree appealed from should be reversed and set aside.

Respectfully,

RICHARDS & HAGA and

McKEEN F. MORROW,

Solicitors for Appellants, Commonwealth Trust Company,
Trustee, and A. C. Robinson.

Residence, Boise, Idaho.

APPENDIX.

The following sections are from the Revised Codes of Idaho:

Acceptance of the Carey Act.

Sec. 1613. The State of Idaho hereby accepts the conditions of Section 4 of an Act of Congress, entitled, "An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid act. The selection, management and disposal of said land shall be vested in the State Board of Land Commissioners, as constituted by Section 7 of Article 9 of the Constitution of the State of Idaho. Said State Board of Land Commissioners shall be hereinafter designated as the "Board."

Proposals to Construct Irrigation Works.

Sec. 1615. Any person, company of persons, association or incorporated company, constructing, having constructed or desiring to construct, ditches, canals or other irrigation works to reclaim land under the provisions of this chapter, shall file with the Board a request for the selection, on behalf of the State, by the Board, of the land to be reclaimed, designating said land by legal subdivisions. This request shall be accompanied by a proposal to construct the ditch, canal or other irrigation works necessary for the complete reclamation of the land asked to be selected. The proposal shall be prepared

in accordance with the rules of the Board and with the regulations of the Department of the Interior; and shall be accompanied by the certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer's report thereon. It shall state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto. In the case of incorporated companies it shall state the name of the company, the purpose of its incorporation, the names and places of residence of its directors and officers, the amount of its authorized and of its paid-up capital. If the applicant is not an incorporated company, the proposal shall set forth the name or names of the party or parties, and such other facts as will enable the Board to determine his or their financial ability to carry out the proposed undertaking.

Certified Check to Accompany Proposal.

Sec. 1616. A certified check for a sum not less than two hundred and fifty dollars, nor more than two thousand five hundred dollars, as may be determined by the rules of the Board, shall accompany each request and proposal, the same to be held as a guarantee of the execution of the contract with the

State, in accordance with its terms, by the party submitting such proposal, in case of the approval of the same and the selection of the land by the Board, and to be forfeited to the State in case of failure of said parties to enter into a contract with the State in accordance with the provisions of this chapter.

Application for Appropriation Permit to Be Filed.

Sec. 1617. The person, company of persons, association or incorporated company making application to the Board for the selection of lands by the State, shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described in the request to the Board. This application for a permit shall be of a form prescribed by the State Engineer and shall be accompanied by two copies of a map of the land to be selected, and it shall show accurately the location and dimensions of the proposed irrigation works. The maps of the lands and proposed irrigation works shall be prepared in accordance with the regulations of the State Engineer's office and the rules of the Department of the Interior.

Submission of Proposal to State Engineer.

Sec. 1618. Immediately upon the receipt of any request and proposal, as designated in Section 1615, it shall be the duty of the Register to examine the same and ascertain if it complies with the rules of the Board and the regulations of the Department of the Interior. If it does not, it is to be returned for correction; but, if it does so comply, it shall be submitted

to the State Engineer, who shall examine the same and make a written report to the Board, stating whether or not the proposed works are feasible; whether the proposed diversion of the public waters of the State will prove beneficial to the public interest; whether there is sufficient unappropriated water in the source of supply; and whether or not a permit to divert and appropriate water through the proposed works has been approved by him; whether the capacity of the proposed works is adequate to reclaim the land described; whether or not the proposed cost of construction is reasonable; and whether or not the maps filed in his office comply with the requirements of said office and the regulations of the Department of the Interior; also whether or not the lands proposed to be irrigated are desert in character and such as may properly be set apart under the provisions of the aforesaid act of Congress and the rules and regulations of the Department of the Interior thereunder. Whenever the State Engineer shall be unable, from an examination of the maps and field notes submitted for his examination, to determine whether or not the proposed irrigation works are feasible and adequate, whether or not the proposed cost of construction is reasonable, or whether or not the proposed diversion of the public water would be beneficial to the public interest, and whether or not the lands proposed to be irrigated are of such a character as to come under the provisions of the aforesaid Act of Congress, it shall be his duty to make, or cause to be made by some qualified assistant, such survey or

examination as will enable him to report intelligently thereon to the Board.

Approval of Application by Board.

Sec. 1619. On receipt of the report of the State Engineer the Register shall place the request and proposal with the Engineer's report thereon before the Board for its consideration. In case of approval the Board shall instruct the Register to file in the local land office a request for the withdrawal of the land described in said proposal. No request on which the State Engineer has reported adversely, either as to the water supply, the feasibility of the construction, the cost or capacity of the works, or as to the character of the lands sought to be irrigated, shall be approved by the Board.

Adverse Report by Engineer.

Sec. 1620. In case the State Engineer shall report adversely upon the proposed irrigation works, or where requests and proposals are not approved by the Board, the said Board shall notify the parties making such proposal of such action and the reasons therefor. The parties so notified shall have sixty days in which to submit a satisfactory proposal; but the Board may, at its descretion, extend the time to six months.

Contract with Proposed Contractor.

Sec. 1621. Upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Board to enter into a contract with the parties

submitting the proposal, which contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works; the price and terms per acre at which such works and perpetual water rights shall be sold to settlers; and the price and terms upon which the State is to dispose of the lands to settlers. This contract shall not be entered into on the part of the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor for irrigation works, which bond shall be in a penal sum equal to five per cent of the estimated cost of the works, and shall be conditioned for the faithful performance of the provisions of the contract with the State.

Same; Limitations on Terms.

Sec. 1622. No contract shall be made by the Board which requires a greater time than five years for the construction of the works, and all contracts shall state that the work shall begin within six months from date of contract; that at least one-tenth of the construction work shall be completed within two years from the date of said contract; that construction shall be prosecuted diligently and continuously to completion, and that a cessation of work under the contract with the State for a period of six months after the second year, without the sanction of the Board, will forfeit to the State all rights under said contract.

Forfeiture of Contract for Contractor's Default.

Sec. 1623. Upon the failure of any parties, having contracts with the State for the construction of irrigation works, to begin the same within the time specified by the contract, or to complete the same within the time or in accordance with the specifications of the contract with the State, to the satisfaction of the State Engineer, it shall be the duty of the Register to give such parties written notice of such failure; and, if after a period of sixty days from the sending of such notice, they shall have failed to proceed with the work or to conform to the specifications of their contract with the State, the bond and contract of such parties and all works constructed thereunder shall be at once and thereby forfeited to the State; and it shall be the duty of the Board at once so to declare and to give notice once each week, for a period of four weeks, in some newspaper of general circulation in the county in which the work is situated, and in one newspaper at the State capital in like manner and for a like period, of the forfeiture of said contract, and that upon a fixed day proposals will be received at the office of the Board in the Capitol at Boise City for the purchase of the incompleted works and for the completion of said contract, the time for receiving said bids to be at least sixty days subsequent to the issuing of the last notice of forfeiture. The money received by the board from the sale of partially completed works under the provisions of this section shall first be applied to the expenses incurred by the State in their forfeiture and dis-

posal, and to satisfying the bond; and the surplus, if any exists, shall be paid to the original contractors with the State.

State Not to Be Responsible for Work.

Sec. 1624. Nothing in this chapter shall be construed as authorizing the Board to obligate the State to pay for any work constructed under any contract, or to hold the State in any way responsible to settlers for the failure of contractors to complete the work according to the terms of their contracts with the State.

Publication of Notice of Opening.

Sec. 1625. Immediately upon the withdrawal of any land for the State by the Department of the Interior, and the inauguration of work by the contractor, it shall be the duty of the Board, by publication once each week in some newspaper of the county in which said lands are situated, and one newspaper at the State capital, for a period of four weeks, to give notice that said land, or any part thereof, as the Board in its discretion may deem is for the best interest of the State, is open for settlement, the price for which said land will be sold to settlers by the State and the contract price at which settlers can purchase water rights or shares in such works.

Application to Enter Land.

Sec. 1626. Any citizen of the United States, or any person having declared his intention to become a citizen of the United States (excepting married women) over the age of twenty-one years, may make

application, under oath, to the Board, to enter any of said land in an amount not to exceed one hundred and sixty acres for any one person; and such application shall set forth that the person desiring to make such entry does so for the purpose of actual reclamation, cultivation and settlement in accordance with the Act of Congress and the laws of this State relating thereto, and that the applicant has never received the benefit of the provisions of this chapter to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company or association who has been authorized by the Board to furnish water for the reclamation of said lands; and, if said applicant has at any previous time entered lands under the provisions of this chapter, he shall so state in his application, together with description, date of entry and location of said land. The Board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications for entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as a partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be refunded to the

applicant. The Board shall dispose of all lands accepted by the State under the provisions of this chapter at the uniform price of fifty cents per acre, half to be paid at the time of entry and the remainder at the time of making final proof by the settler.

Disposition of Proceeds of Sale.

Sec. 1627. As provided in the Act of Congress, all moneys received by the Board from the sale of lands selected under the provisions of this chapter shall be deposited with the State Treasurer, and such sums as may be necessary shall be available for the payment of the expenses of the Board and of the State Engineer's office incurred in carrying out the provisions of this chapter.

Such expenses shall be paid by the State Auditor in the manner provided by law, upon vouchers duly approved by the State Board of Examiners, for the work performed under the direction of the State Board of Land Commissioners, and by the State Engineer for all work performed by the State Engineer's office; and any balance remaining over and above the expense necessary to carry out the provisions of this chapter, shall constitute a trust fund in the hands of the State Treasurer to be used only for the reclamation of other arid lands.

Proof of Reclamation by Settlers.

Sec. 1628. Within one year after any person, company of persons, association or incorporated company, authorized to construct irrigation works under the provisions of this chapter, shall have notified the

settlers under such works that they are prepared to furnish water under the terms of their contract with the State the said settler shall cultivate and reclaim not less than one-sixteenth part of the land filed upon, and within two years after the said notice the settler shall have actually irrigated and cultivated not less than one-eighth of the land filed upon, and within three years from the date of said notice the settler shall appear before the register of the State Board of Land Commissioners, a judge or clerk of any Court of record within the State, or commissioners to be designated by the Board, within the State, and make final proof of reclamation, settlement and occupation, which proof shall embrace evidence that he is the owner of shares in the works which entitle him to a water right for his entire tract of land sufficient in volumn for the complete irrigation and reclamation thereof; that he has been an actual settler thereon and has cultivated and irrigated not less than one-eighth part of said tract; and such further proof, if any, as may be required by the regulations of the Department of the Interior and the Board. The officer taking this proof shall be entitled to receive a fee of two dollars, which fee shall be paid by the settler and shall be in addition to the price paid to the State for the land; *Provided*, That when the Register of the Board takes final proof, all fees received by him shall be turned into the State Treasury. The commissioners appointed by the Board are hereby authorized to administer oaths. All proofs so received shall be submitted by the Register to the Board

and shall be accompanied by the final payment for said land, and upon approval of the same by the Board the settler shall be entitled to his patent. If the land shall not be embraced in any patent theretofore issued to the State by the United States, the proofs shall be forwarded to the Secretary of the Interior, with the request that a patent to said lands be issued to the State.

When the works designed for the irrigation of lands under the provisions of this chapter shall be so far completed as to actually furnish an ample supply of water in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the State of Idaho shall, through the State Board of Land Commissioners, make proof of such fact, and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior.

Water Contracts a Lien on Land Foreclosures.

Sec. 1629. Upon the issuance of a patent to any lands by the United States to the State, notice shall be forwarded to the settler upon such land. It shall be the duty of the Board, under the signature of the President, attested by its Register, to issue a patent to said lands from the State to the settler.

The water rights to all lands acquired under the provisions of this chapter shall attach to and become appurtenant to the land as soon as title passes from the United States to the State. Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water

right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired. The contract for the water right upon which the aforesaid lien is founded shall be recorded in the office of the recorder of the county where said land is situate.

Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder at the front door of the Court House of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. And at such sale no person, company of persons, association or incorporated company, owning and holding any lien, shall bid in or

purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURG, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

BRIEF OF APPELLEES

SAMUEL H. HAYS,

Solicitor for Appellant, Twin Falls-Salmon
River Land and Water Company.

J. H. RICHARDS,

O. O. HAGA,

Solicitors for Appellants, Commonwealth
Trust Co. and A. C. Robinson.

PASCO B. CARTER,

Solicitor for Appellant, Salmon River Canal Co.

C. O. LONGLEY,

E. A. WALTERS,

Solicitors for Appellees.

Filed
FEB 23 1916
F. D. Monckton,
Clerk.

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BRIEF OF APPELLEES

STATEMENT OF THE CASE.

We feel warranted in making a further statement of the case, in view of the statement appearing in the brief of the Land and Water Company, and will attempt to support our statement by reference to the record.

The action is one brought by certain settlers upon what is known in Southern Idaho as the Salmon River Carey Act Project, and is maintained not only for the plaintiffs named in the bill, but for and on behalf and for the benefit of all settlers and water contract holders upon said tract (par. 34, p. 36); these settlers have individual holdings upon said project, evidenced by what are called settlers' contracts with the Land and Water Company for a water right for the irrigation of their respective holdings (par. 10, p. 13).

It is the claim of these contract holders (Carey Act entry-men) that in entering into a contract with the Land and Water Company, hereinafter called the Company, they purchased of such Company and agreed to pay \$40.00 per acre for a water right for each acre of the land entered by them, as well as for a proportionate interest in the irrigation system to be constructed for the conservation and distribution of the water so purchased (par. 10, p. 54, State Contract).

It is the further claim of the settlers that in violation of the express terms of the State Contract, which, by reference, became a part of the settlers' contract, the Company has sold water rights for lands far in "excess of the appropriation of water therefor" (1st par. on p. 52), and that by reason of such fact, the Company is unable to comply with the terms of its contract and cannot furnish or deliver the water right purchased (par. 17, p. 20).

The settlers are refusing to pay the instalments due under the terms of the contract, and for relief ask that the Company and its successors be enjoined from collecting such instalments until the water right sold is delivered; further asking that a receiver be appointed to take charge of the project, and reduce the area thereof so that those who can be supplied with water from the amount available may pay, and such portion of the money so paid as shall be necessary, be used to reimburse those whose investments upon the lands will be lost by the failure of the Company to supply water under the contracts.

It is the further claim of the settlers that the Land and Water Company is insolvent and there is no other water available than the flow of Salmon Falls creek.

The Land and Water Company, as a party defendant, as we understand its claim, contends that it did not agree to sell any water right; but only a proportionate interest in an irrigation system to be represented by shares of stock in a company, known as the Canal Company, and to it would be trans-

ferred what the Land and Water Company had acquired in the way of a water right as well as all works of diversion.

That having constructed a dam and various canals for purposes of distribution, and the dam being entirely efficient for the purpose of conserving all the water in the creek, and the canals and laterals adequate for the distribution of such water, the Company has fully performed its contract and is entitled to collect the amounts due under such contracts regardless of the question of water supply.

The Company also issued bonds, to secure the payment of which it assigned as collateral the settlers' contracts to one of the appellants, A. C. Robinson, and also executed a trust deed upon all of its interest in the system to the appellant Trust Company, as trustee. This trust deed embraces all of the property rights of every kind owned by the Company as security for the payment of the bonds, and it further appears that the Company has defaulted in the payment of the interest due thereon (131).

It further appears that both the trustee and Robinson are residents of the State of Pennsylvania, are attempting to collect the moneys claimed to be due under the water contracts and have instituted foreclosure proceedings for such purpose in the District Court of the United States for Idaho (190).

The other appellant to the action, the Canal Company, is but a nominal party to the action, and is solely under the control of the Land and Water Company.

The cause was tried before the Court, and, following a memorandum decision (279-307), an interlocutory decree was entered, here set forth in full, in which counsel for appellants have, for some reason, treated as final:

INTERLOCUTORY DECREE.

“That the defendant Twin Falls Salmon River Land & Water Company contracted with the State of Idaho and with the settlers holding agreements for the purchase and

sale of water rights that it, the said defendant, would provide a system of canals and reservoirs on what is known as the Salmon River Project, in Twin Falls County, State of Idaho, which in ordinary seasons would furnish a supply of water for irrigation purposes sufficient for the acreage covered by such settlers' agreements at the rate of two and three-fourths acre feet per acre, measured at the points of delivery from the system into the consumers' laterals; and further that it would not sell rights in excess of such available supply. That the said defendant be restrained from making additional contracts for the sale of water rights and also from waiving the right to forfeit any existing contract. That the said defendant and the Commonwealth Trust Company of Pittsburgh, a corporation, Trustee, and A. C. Robinson, be, and each of them is, hereby enjoined and restrained from collecting or attempting to collect, or from enforcing payments upon said water right agreements, including any overdue payments or installments on said agreements, until such time as the holders thereof have been provided with the water supply so contracted for, or are given trustworthy assurance, to be approved by the court, that said water will be provided, or until the further order of this court.

"It is further ordered and decreed that jurisdiction be retained for the purpose of making final disposition of the cause, and leave is hereby granted to either party to make application at any time for the introduction of further proof touching the available water supply, and more particularly relating to (1) the amount and dignity of the rights awarded to adverse claimants in the suit of Twin Falls Salmon River Land & Water Company, et al., v. Vineyard Land & Stock Company, now pending in this Court, and numbered 405; (2) seepage in the reservoir basin and the canal system; and (3) the aggregate amount of water agreements actually outstanding at the time of such application, and upon the submission of such proof for the entry of final decree.

"Dated this 29th day of November, 1915 "

ISSUES.

The controlling and practically the only question presented

to the Court below was as to the construction and meaning of the contracts between the parties. The only disputed question of fact presented by the record is as to the run-off of "Salmon Falls Creek," as it is called by the U. S. Geological Survey (173). The figures of the Geological Survey give the stream an average yearly run-off of 127,000 acre feet (179), while the Company measurements disclose a yearly average of 130,295 acre feet (192).

It was agreed upon the trial that all contract holders upon the project held under contracts identical as to terms and provisions, and that all contract holders are similarly situated as to their rights under the contract (128-129); that no patents have issued from the United States for any of the Carey Act lands (130).

It is further stipulated and agreed that the Land and Water Company had never delivered to any of the contract holders, pursuant to the terms of the settlers' contracts, water to the extent of one-half inch per acre continuous flow from the 1st day of April to the 1st day of November of each irrigation season (133).

The evidence taken upon the trial further discloses that the water first began to run in the reservoir and be conserved the latter part of the year 1910, but did not become available for diversion into the canal system until April, 1911; that there are no available records as to the acreage in crop in 1911 or the amount of water delivered for that year; but that in 1912 the total acreage in crop was 16,310 acres; in 1913, there were 23,403 acres in crop and in 1914 a total of 30,064 acres in crop; that on the first day of October, 1912, after the distribution of water to the settlers had been discontinued there remained in the reservoir 43,550 acre feet and there had been delivered that year to the settlers—measured at the settlers weir—29,350 acre feet. As the only source of information that could be had was from the records of the Company, these records were employed for the purpose of showing all facts

pertaining to the conservation and distribution of water. It further appears from the records of the Company that the run-off for the year 1912, was 154,000 acre feet; the transmission loss, 50 per cent of the water turned out of the reservoir gate, and that the reservoir loss for that year was 64,181 acre feet—this loss made up of percolation or seepage and evaporation loss. It should be observed in connection with the foregoing, that the run-off of the river, as given, is taken from the Geographical Survey records rather than from the Company record, which was 169,888 acre feet.

An analysis of the figures for the year 1912, discloses that after deducting the reservoir loss from the 169,888 acre feet run-off left in the reservoir, 105,707 acre feet were available for distribution; deducting from this 50 per cent for transmission loss, left 52,852 acre feet, measured at the farmers' weir, or water for 25.8 days, at the rate of one-half inch per acre continuous flow, or about 20 per cent of two and three-fourths ($2\frac{3}{4}$) acre feet, which would be the equivalent of 6.6 inches for the season.

The foregoing would be on the assumption that all of the water contracts sold and outstanding, and embracing 73,000 acres, were receiving water.

Taking the Company records again for the year 1913, it appears that the annual run-off was 108,405 acre feet, the reservoir loss 46,314 acre feet, leaving 62,091 acre feet for distribution at the mouth of the reservoir; transmission loss for that year was 33 per cent, making 20,697 acre feet lost in transit to the farmers' weir. This would make available at such point 41,394 acre feet, or water for the entire 73,000 acres for 20.6 days at one-half inch per acre continuous flow, or five (5) inches of water for the season, being 15 per cent of two and three-fourths ($2\frac{3}{4}$) acre feet.

For the year 1914, the Company records show a run-off of 135,295 acre feet; a reservoir loss of 38,032 acre feet, leaving for distribution 97,263 acre feet; the transmission loss for that

year was 27.3 per cent, making a total loss in transit of 26,558 acre feet, which would deliver at the farmers' weir 70,705 acre feet, or water for 35.15 days at one-half inch per acre continuous flow, or 8.45 inches for the season.

The average of the three years would be 54,981 acre feet, and giving each water user two and three-fourths ($2\frac{3}{4}$) acre feet at his weir, would irrigate 18,535 acres out of the 73,000 acres sold.

From the foregoing figures, and giving the settler two and three-fourths ($2\frac{3}{4}$) acre feet of water for the season, 15,600 acres could have been irrigated in 1912; 10,950 acres in 1913 and 18,688 acres in 1914, so that with only 30,000 acres of the total sold in cultivation in the year 1914, there was an excess of acreage over the water supply to the extent of something over 12,000 acres.

It should be further noted that according to the figures of the Company for the year 1912, the 16,000 acres in crop received 1.8 acre feet; in 1913 after the largest run-off the river has ever disclosed, according to the data available, the 23,403 acres in crop received 2.14 acre feet, and in 1914 with 30,000 acres in crop, the farmers received 2.46 acre feet.

It further appears from the record that the Company refused to deliver any specific amount for the season and refused to recognize the right of the water user either to receive the two and three-fourths ($2\frac{3}{4}$) acre feet contended for by the settler, or the one-half inch continuous flow from April 1st to November 1st, or its equivalent as specified in the contract (139).

It further appears that demands were made by the settlers during each of the years 1912, 1913 and 1914, and while they were not always in the form of a demand for two and three-fourths ($2\frac{3}{4}$) acre feet, but were sometimes for the delivery of a continuous flow of one-half inch per acre from April 1st to November 1st, the demands were always refused and have not been complied with in any case, and this, irrespective of the amount of water stored in the reservoir (140).

It further appears from the testimony of the Chief Engineer of the Company, that starting with the water supply on hand, as fixed by the witness at 25,000 acre feet in the reservoir on April 1st, 1915, and supplying the entire 73,000 acers sold with one-half inch per acre continuous flow, and assuming the reservoir received the same flow for the year 1915 as for 1914, the water supply would last for about 15 days, when the reservoir would be exhausted (142).

It further appears from the testimony of one of the witnesses for the plaintiff, and also a settler upon the project, that he had not tendered performance thereof with reference to the payment of instalments because of the statement given the witness by different officers of the Company that he did not purchase a water right, but had merely purchased a proportionate interest in an irrigation system which was absolutely worthless to him without the water, so he refused to make payments (146); that he was ready, willing and able to comply with his contract if he received the water specified therein; that he had been advised at different times that he could not have more water when he asked for it, and that is the extent of the advice he received from the Water Company relative to water deliveries (146).

The same witness produced plaintiffs' Exhibit 17 purporting to be a circular issued over the signature of the Twin Falls Salmon River Land and Water Company, W. S. Kuhn, President (155), and in which the reader was advised that 80,000 acres of the Salmon River Project had been opened for entry on June 8, 1908, and 70,000 acres of the land filed upon during that month, and further advised that the tract affords "water supply of the best and in abundance" (147).

The circular proceeds to advise how lands and **water rights** are secured (148), and that the price of the water right and land on the Salmon Project is fixed by the State Land Board at \$40.00 for the water right and 50c per acre for the land, and that the first payment on the water right is \$3 25,

and then follows the terms of the instalment payments upon the water right (149). This circular under the head of "Water Supply" advises the reader that "the water supply for the Twin Falls Salmon River Project is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve. **The water right is perfect**, and there is no land susceptible of irrigation above the Salmon district, and **no water rights in contest**. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation of this amount of land for the full season" (152).

The witness testified that he saw and read these advertisements prior to the time he took, by assignment, the contracts issued by the Company, and relied upon the statements contained in the circulars issued by the Company, and to the effect that the State of Idaho guaranteed to protect the settlers in these matters, and also in a general way, upon the amount of land to be reclaimed and upon the sufficiency of the water right (156).

QUESTIONS PRESENTED FOR REVIEW.

For the purpose of analysis, we divide the questions to be presented for review by the appellate Court under two heads: First, as to how far the appellate Court will go in considering the facts and law in reviewing the appeal from an interlocutory order in this case; and second, the construction of the contract between the parties.

The appeal in this case having been taken from an interlocutory order, by which the Lower Court has restrained the defendant company, and its successors in interest from the collection of any of the instalments claimed to be due under the water contracts until the final order and decree of the Court, and the well recognized rule being that the appellate Court will not disturb an interlocutory order, granting an in-

junction unless the Trial Court has clearly abused its discretion, presents the first question in this case.

Southern Pacific Company vs. Earl, 82 Fed. 690.

As it is the rule that "the granting of a preliminary injunction in the exercise of the judicial discretion of the Circuit Court will not be set aside on appeal unless it clearly appears that the Court erred in applying the legal principles which should have guided it when considered from the Circuit Court standpoint." If such rule is applicable and controlling to the appeal in this case, our inquiry will cease if the question proposed be determined favorable to the appellee.

Massey vs. Buck, 128 Fed. 27.

The appellant in this case has treated the interlocutory order as final and on the theory that the appellate Court will be required to consider the questions raised in the Court below.

In order to properly pass upon the first question here suggested, we will of necessity refer to the contract existing between the parties, as the construction of this contract will be one of the fundamental and controlling questions in the case.

ARGUMENT.

Taking up the first question proposed, we find the following authorities, in point: "The Circuit Court of Appeals will not disturb an interlocutory order granting an injunction where the questions of the law or fact to be ultimately determined are difficult, and injury to the moving party will be immediate, certain and great, if the relief is denied, while the loss to the opposing party will be comparatively small if it is granted."

Dimick vs. Shaw, 94 Fed., 266.

In connection with the foregoing rule, we wish to call the attention of the Court to the undoubted fact that if it be the final order of the Lower Court in this case, that the appellant has the right to collect these contracts, and this without regard

to the question of whether any delivery of the water right sold has been made, the interlocutory order in this case does not deprive the defendant of one penny of the money due under such contract; so that there can be no material injury to the appellants because of the order.

On the other hand, if the appellants are permitted to enforce the payments claimed to be due under these contracts, and the money is paid and taken by the trustee to the State of Pennsylvania and out of the jurisdiction of the Trial Court, and it should then be ultimately held by the final decree of the Court that the holders of these water contracts were entitled to receive the water right purchased, which had not and could not be delivered to all of the contract holders, the purchaser who had been forced to make such payment for something he had not received, would be placed in a very different position, and one involving certain loss and injury to him, from that occupied by the appellants under the interlocutory order of the Court.

“An interlocutory order granting a preliminary injunction will not be reversed on appeal unless it appears from the record that the injunction was improvidently granted ”

Hammond Electric Company vs. Board of Trade, 143 Fed. 292.

“The granting of a preliminary injunction in the exercise of the judicial discretion of the Circuit Court will not be set aside on appeal unless it clearly appears that the Court erred in applying the legal principles which should have guided it when considered from the Circuit Court’s standpoint.”

Massie vs. Buck, 128 Fed 27.

“An order granting a preliminary injunction restraining the removal out of the jurisdiction of the Court all property on which complainant claims a lien, will not be disturbed by an appellate Court when such removal might work irreparable injury to complainant, and the continuance of the

injunction can not seriously harm the defendants, unless it is entirely clear from the record that there is no equity in the bill."

Korum vs. Ingersoll, 133 Fed. 226.

In the Korum case *supra*, Circuit Court of Appeals held: First, "This case is practically ready for final hearing upon its merits"; and second, "the vacating of the present order might result in irreparable injury to the appellee. while its continuance works comparatively little harm to the defendants. The whole object of the injunction is simply to prevent the transfer beyond the jurisdiction of this Court, pending the hearing upon the merits, of a fund on which the appellant claims to have a lien. In other words, the sole effect of the injunction is that matters remain in statu quo."

If the settlers in the case at bar are correct in believing they purchased something which must be delivered to them before they can be required to pay the purchase price, and as the evidence clearly shows that water contracts have been sold far in excess of the water supply, and assume that it should become incumbent upon the settlers themselves, in the protection of their interests and investments upon this project, to so reduce the area of the project as to enable those instrumental in reducing this area to receive substantially the water right contracted for, would not such settlers have the right to first look to and rely upon the moneys to be paid by them under their water contracts as a fund for the purpose of accomplishing the result suggested?

It is obvious that if the appellants are entitled to enforce the collection of the instalments of purchase price according to the time of their maturity under the contracts, and these collections are sent to the trustee and by him applied to the payment of interest in default and principal due upon the bonds of the construction company, such a condition "might work irreparable injury to complainant" and leave the contract holders practically without remedy.

Decisions of the Circuit Court of Appeals fully sustaining the foregoing rules are as follows:

“Encyclopaedia Company vs. Association, 130 Fed. 460.

Dimeck vs. Shaw, 94 Fed. 266.

Southern Pacific Company vs. Earl, 82 Fed. 690.”

“Where an interlocutory injunction is merely subsidiary to other relief, an appeal to the Circuit Court of Appeals presents only the question whether, conceding such other relief to have been proper, injunction was a proper remedy ”

Const. Co. vs. Young, 59 Fed. 721.

“On an appeal to the Circuit Court of Appeals from an interlocutory order granting an injunction, the right of complainant to other relief demanded by his bill can not be considered when it has not been passed upon by the Court below: and the only question before the appellate Court is the propriety of the injunction.”

Hart vs. Buckner, 54 Fed. 925.

The brief summary of the evidence heretofore presented will show that no attempt has been made by the Company to deliver any specific water right to the purchasers of these water contracts; and in addition to this, such portion of the record as we have incorporated herein, will show that the Company has never recognized or conceded that it sold any specific water right to the contract holders. This of necessity calls for some consideration of the contracts involved, and we will review to some extent the Federal laws pertaining to “Carey Act” matters, the laws of the State of Idaho pursuant to which these contracts were made, and the contracts themselves, for the purpose of ascertaining what rights the purchasers of these contracts have acquired.

STATUTES INVOLVED.

The acts of Congress under which the lands in question were ceded by the United States to the State of Idaho are: Act

August 18, 1894, c. 301, Sec. 4, 28 Stat. 422 (U. S. Comp. St. 1901, page 1554); Act June 11th, 1896, c. 420, Sec. 1, 29 Stat. 413 (U. S. Comp. St. 1901, page 1556); and Act March 3rd, 1901, c. 853, Sec. 3, 31 Stat. 1118 (U. S. Comp. St. 1901, page 1557), which merely extends the time for reclamation by the State.

The substance of the Congressional enactments is that to aid the public land States in the reclamation of desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior was authorized, upon proper application of a State, to contract with it to donate and patent to the State not exceeding one million acres in each State as the State may cause to be irrigated, reclaimed and occupied. Before the application of the State is allowed, or any contract made for the ultimate reclamation of the lands, or any segregation of the lands from the public domain is ordered, the State was required to file a map of the lands proposed to be irrigated, with a plan showing the mode thereof, and evidence that such plan was sufficient to thoroughly irrigate and reclaim said land preparatory to the raising of ordinary agricultural crops, and also showing the source of the water supply to be used for irrigation. The State so contracting is authorized to make all necessary contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of the Act; the State being prohibited to lease any of said lands or to use or dispose of them in any way except to secure their reclamation, cultivation and settlement. A lien is authorized by the State and by no other authority on and against the separate legal sub-divisions of the lands so to be reclaimed for the actual cost and necessary expense of reclamation and reasonable interest thereon; and, when **an ample supply of water** is furnished to reclaim a particular tract or tracts, the patent should issue to the State for the same, without regard to settlement or cultivation. Section four of the Act of August 18, 1894, contains the provision that "as fast

as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior that any of said lands are irrigated, reclaimed and occupied by actual settlers, patent shall be issued to the State or its assigns for said land so reclaimed and settled ”

The State of Idaho accepted the terms and conditions of the Federal enactment, commonly known as the “Carey Act” and the provisions of the Idaho laws pertinent to the question are as follows:

Section 1613 accepts the conditions of Section 4 of the Act of Congress, together with the grants of land to the State under the provisions of said Act, and vests the selection, management and disposition of said lands in the State Board of Land Commissioners, designated hereinafter as the “Board.”

Section 1615 provides that any person or incorporated company, constructing or having constructed ditches, canals or other irrigation works to reclaim such lands, shall file with the Board a request for the selection on behalf of the State by the Board of the land sought to be reclaimed, which request shall be accompanied by a proposal to construct the irrigation works necessary for the **complete reclamation** of the lands to be selected, and the proposal to be prepared in accordance with the rules of the Board and the regulations of the Department of the Interior; the proposal shall also be accompanied by a certificate of the State Engineer that application for permit to appropriate water has been filed in his office, together with the State Engineer’s report thereon; the proposal shall also state the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which **perpetual water rights will be sold to settlers**, said perpetual water right to embrace a proportionate interest in the canal or other irrigation works, together with the rights and franchises attached thereto.

Section 1616 provides that the Board shall have the authority to prescribe that each proposal shall be accompanied by a

certified check to be held as a guaranty of the execution of a contract with the State.

Section 1617 provides that the person or company making application shall file with the State Engineer an application for a permit to appropriate water for the reclamation of the lands prescribed, and such application to be accompanied by maps of the land selected for the proposed irrigation works and to be prepared in accordance with the regulations prescribed by the State Engineer and the rules of the Department of the Interior.

Section 1618 provides for the examination of the proposal by the Registrar of the Board to see that it is in form, and if so, it shall then be submitted to the State Engineer, who shall examine the same and make a written report to the Board as to whether the proposed works are feasible; whether the proposed diversion of the public waters of the State will prove beneficial to the public interest; whether there is **sufficient unappropriated water** in the source of supply; and further provides that whenever the State Engineer shall be unable from the data available to determine either or any of the questions prescribed for his determination and report, it shall be his duty to make or cause to be made, such survey or examination as will enable him to report intelligently thereon to the Board.

Section 1619 provides for the approval of the proposal by the Board, on the express condition that the report of the State Engineer shall be favorable; but expressly provides that no approval or acceptance of any proposal shall be made in case the State Engineer reports adversely, either as to the water supply, the feasibility of construction, the cost or capacity of the works, or as to the character of the land sought to be irrigated.

Section 1621 provides that upon the withdrawal of the land by the Department of the Interior, it shall be the duty of the Board to enter into a contract with the party submitting the

proposal, and that such contract shall contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works, the terms per acre at which such works and **perpetual water rights** shall be sold to settlers, and the price and terms upon which the State is to dispose of the lands to settlers; this contract not to be entered into, however, by the State until the withdrawal of the lands by the Department of the Interior and the filing of a satisfactory bond on the part of the proposed contractor in a penal sum equal to five per cent of the estimated cost of the works and which bond shall be conditioned for the faithful performance of the provisions of the contract with the State.

Section 1622 provides as to the time within which the works must be completed, giving five years for the construction of the works.

Section 1623 provides that the contract may be forfeited for the contractor's default, in the method indicated by such provision.

Section 1625 provides for the publication of notice of opening of segregation for sale and entry, and that such publication must contain the price for which said land will be sold to settlers by the State, and the contract price at which settlers can **purchase perpetual water rights**.

Section 1626 prescribes the qualifications of such settlers and requires the application of the settler must be accompanied by a certified copy of a contract for a **perpetual water right**, made and entered into by the party making application with the person, company or association who has been authorized by the Board to furnish water for the reclamation of said lands; and the Board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant, the Board to dispose of all lands accepted by the State at a uniform price of fifty cents per acre.

Section 1628 provides for the proof of reclamation by the settlers and the section further provides that when the works designed for the irrigation of lands under the provisions of the chapter shall be so far completed as to actually furnish **"an ample supply of water in a substantial ditch,"** the State of Idaho shall make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior.

Section 1629 provides that the water rights shall attach to and become appurtenant to the land as soon as title passes from the United States to the State, and that the Construction Company furnishing the water for the land shall have a first and prior lien on said water right and land for all deferred payments for said water right; that such lien shall be a prior lien and may be foreclosed as by said section provided.

The contract with the State was executed on April 30, 1908, and the opening for entry for holders of water right agreements of 80,000 acres of land was held on or about June 1 1908. It should be kept in mind that no one could apply to enter lands under the provisions of the Acts, either State or Federal, unless they held a settlers' contract with the Company for the purchase of a water right.

Passing upon the relative situation of the parties before the settlers' contract was executed, as observed in the memorandum decision of the Trial Court: "In the first place, it is highly improbable that settlers would have signed a contract by which they must obligate themselves to pay at the rate of \$40.00 per acre for the mere chance of sharing with an indefinite number of others in a projected irrigation system, concerning the capacity and efficiency of which they could, in the nature of things, have but little information."

The Construction Company, pursuant to the laws of the State, first makes the application for the segregation of the lands and submits a proposal as to how these lands are to be reclaimed. One of the essential elements of this proposal is

a showing as to how the lands are to be irrigated; the source of water supply, and that there is sufficient unappropriated water in the source of supply to warrant the acceptance of such proposal by the State.

All of these vital facts are determined prior to the execution of the contract between the State and the Construction Company, and the settler has of necessity no knowledge or information concerning them, except that he undeniably has the right to assume that the State officials will faithfully perform their duty and that all of the matters called for by the statutes of the State will be carefully and scrupulously attended to by such State officials. As we understand it, one of the principal points of argument contended for by the appellant in this case is predicated upon the theory, or reasoning, that the State, having permitted the contract for the reclamation of 150,000 acres of land to be entered into and that there then proving to be insufficient water to irrigate and reclaim such area, the settler who holds such water contract can make no complaint. This would place a premium upon the inefficiency or corruption of State officials and permit the adventurer in enterprises of this kind to make any sort of a proposal to a State, which, if accepted, and regardless of the question of performance, could be enforced as against the settlers who relied upon the provisions of the law adopted for their protection. In practically all of the Carey Act projects, not only the State contract is entered into prior to the work of construction upon the project, but the settler's contract as well, and, aside from his said contract, the settler has no knowledge or means of knowledge as to just what the result of the work, or as to what the performance of the Construction Company will be under the contract with the State; and of course this is especially true in projects involving the storage and conservation of the waters in streams as distinguished from projects diverting the flow of a river or creek.

The settler, in fact, has no "means of determining whether a proposed reservoir will hold water or whether the water shed

is sufficient to fill it; these are matters peculiarly for the Company to investigate. Can it for a moment be supposed that even the most susceptible could be induced to sign contracts if they were informed that the Company would give no promise of a sufficient supply; no assurance of any sufficient quantity; no undertaking that any given amount would be available for the project as a whole; and no guaranteed limit upon the number of acres for which water rights would be sold?" (Memo. Dec., p. 283.)

Upon the other hand, under our State law, the Construction Company is bound to take out a permit for sufficient water to irrigate and reclaim the land, taking this permit in its own name and not in the name of the settlers whose property it will thereafter become; and if it be contended that the Company has no interest in nor agreement to sell a water right of a specific amount, why should it file upon water in any specific quantity or make any filing upon water at all?

From the circular heretofore referred to, it appears that the Kuhn interests, which were responsible for the building of this project, were well satisfied and had full confidence in the adequacy of the water supply, as the prospective settlers were therein advised that the "water supply is of the best and in abundance"; that "the water supply is obtained from the Salmon River, which has a vast drainage area in the Cassia National Forest Reserve; the water right is perfect and there is no land susceptible of irrigation above the Salmon tract, and no water rights in contest. It carries water sufficient for the irrigation of more than 150,000 acres in normal years, and as a rule the spring run-off is far greater than the amount of water required for the irrigation of this amount of land for the full season."

As observed by the Trial Court in its memorandum decision, "It will thus be seen that no doubt was entertained of an abundance of water, and if it was confident of a supply sufficient in normal years for 150,000 acres, there is no apparent

reason why it should not, for the purpose of selling rights for 80,000 acres, make its contract attractive by incorporating therein an undertaking to furnish a comparatively small specific amount; with such a margin of safety, there could be no substantial risk."

Reference is made by counsel for appellant to this circular, and some effort made to discredit the same as not being a Kuhn publication, by claiming at this time that the circular was issued by someone other than the defendant company, and for which the defendant company is in no wise responsible. There was no objection, however, predicated upon such grounds or upon any ground of which we are advised to the introduction of plaintiff's Exhibit No. 17, being the circular in question. The reasonable inference is, therefore, that the Company proceeded in this matter either with the belief that it could conserve sufficient water to furnish the settlers with a specific amount, or with such reckless disregard of the facts as to justify and require the same conclusion. Not only this, but the express provisions of Section 1615 of the Revised Codes of Idaho require the Construction Company to include within its proposal to the State, for the construction of the works, the statement as to "the price and terms per acre at which **perpetual water rights** will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto."

Now, if no specific water right was sold, and the settler is only entitled to receive a proportionate interest in what the company may be able to conserve, can it be said that a "perpetual water right" was sold? "Perpetual" has been legally defined as something which is to last without limitation as to time. If appellants mean that the perpetual right sold is the right to receive what water might be available for delivery—that is, when sufficient water was conserved to distribute, the contract holders should receive it, and when there was an in-

sufficient supply the contract holders should go without, the word "perpetual" evidently applies to the needs and necessities of the Company rather than to the right of the settler to any specific thing or amount of water.

The Trial Court was called upon to construe the contracts in suit, and the result of such analysis appears in the memorandum decision of the Court, and is such a clear, precise and logical construction of those contracts that we take the liberty as well as distinct advantage of incorporating a considerable portion herein:

"Now as to the contracts themselves. A printed form was prepared by the Company and offered to the public, which is the form held by the plaintiffs and all other settlers. This recites the incorporation of the Company, its execution of the State contract, the commencement of construction work, notice from the State Land Board that it (the Company) might proceed to sell or contract rights to the use of water, and thereupon it is agreed that in consideration of the payment of a certain amount of money, and the covenants on the part of the settler, the settler 'shall become entitled to..... shares of the stock of the Salmon River Canal Company, Limited, the certificate thereof to be in the form as follows:

".....Shares.190...

"This is to certify.....is the owner of.....shares of the capital stock of the Salmon River Canal Company, Limited.

"This certificate entitles the owner thereof to receive one-hundredth of a cubic foot of water per acre per second of time for the following described land:.....

..... in accordance with the terms of the contract between the State of Idaho and the Twin Falls Salmon River Land and Water Company, and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises

of the Twin Falls Salmon River Land and Water Company, based upon the number of shares finally sold in accordance with the said contract between the said Company and the State of Idaho.

SALMON RIVER CANAL COMPANY, LIMITED,

By....., President.

Attest: , Secretary.

“Then follows a clause dedicating the water right to the land described, and to none other. There are numerous other provisions touching the manner and times for paying the purchase price and maintenance charges, the temporary operation of the system, and other subjects not relevant to the present inquiry. The irrigation season is defined to be from April 1st to November 1st of each year. Certain other clauses which may be deemed to be pertinent, are as follows: ‘Said certificate (that is, said certificate of stock) to be delivered as provided for in said State contract and under the conditions therein stated. * * * This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties, and shall regulate the provisions of the shares of stock to be issued to the purchaser by the Salmon River Canal Company, Limited. * * * This contract is made pursuant to and subject to the contract between the Company and the State of Idaho, and the existing laws of said State.’”

“The import of the instrument, standing alone as it would be understood by an intelligent layman with no preconceived notions of its meaning, is not open to debate. It is a contract for the sale of a specific water right of one-hundredth of a second foot per acre for each acre of land described, and as an incident thereto a proportionate interest in the irrigation system. The holder of a certificate of stock, so the contract

reads, is entitled 'to receive one-hundredth of a cubic foot of water per acre,' and 'a proportionate interest in the dam, canal, water rights,' etc. The defendants' contention wholly ignores the first of these co-ordinate clauses, and limits the right granted precisely to the second. But the clauses are neither inconsistent with each other nor identical in meaning, and no reason is apparent why they should not both be given effect. If the suggestion be made that in form the contract provides only for the transfer of the certificate of stock in the Canal Company, and does not in terms convey a water right at all, the answer is that the technical form is quite unimportant. The clear purport of the entire instrument is the sale of the water right, and that is undoubtedly the sense in which the Company expected it would be understood, and in which it was understood by the settler. One of the preliminary recitals is that the State Board had notified the Company that it could proceed to sell, not certificates of stock, but water rights; and paragraph three reads: 'The consideration for the water rights hereby agreed to be conveyed is the sum of \$.....,' etc. It will not be assumed that the instrument was cunningly drawn to deceive the unwary, 'to keep the word of promise to the ear and break it to the hope.'

"By itself the settler's contract thus appears to be unequivocal, and we next inquire whether its apparent import is materially qualified by its references to and adoption of the state contract. Doubtless the two instruments must be read together, and in some respects the one is to be deemed the complement of the other. But it is to be borne in mind that the settlers' contracts are subsequent in time to that of the state, and insofar as they clearly and fully express the agreement of the parties upon a given subject they are controlling, provided, of course, they contravene no statute of the state or of the nation. In this connection it is not to be overlooked that the state contract expressly provides that the Company

may at its option contract to sell rights upon terms more favorable than those which it prescribes. But were a different view to be taken, is there anything in the state contract so opposed to the idea of a water right of a definite amount that it must be held to render the granting clause in the settler's contract inoperative? The first paragraph binds the Company to build the system, 'and to sell shares of water right' therein, '**and also** to transfer the ownership,' etc., of the system to the settlers—a general plan entirely in harmony with the settler's contract. By paragraph two the Company is required to supply a reservoir capacity of 180,000 acre feet, and a canal capacity of one-hundredth of a second foot for each acre of land sold. In paragraph four there is an apparent difficulty, not, however, strictly in relation to the proposition of a definite water right; a specific amount is suggested which does not appear to correspond with that called for by the settler's contract. The paragraph recites that the Company holds a permit for the appropriation of 1500 second feet of the waters of Salmon River, and thereupon the statement is made that it 'has been determined' that the natural flow of the stream, supplemented by a reservoir capacity of 180,000 acre feet, will be sufficient to provide 'two and three-fourths acre feet of water per acre for each acre of land to be irrigated.' Thereupon follows a reiteration of the obligation of the Company to construct canals of a sufficient capacity for one-hundredth of a second foot per acre. Now assuming a continuous flow of one-hundredth of a second foot per acre throughout the entire period from April 1st to November 1st of each year, there is a want of correspondence between two and three-fourths acre feet and one-hundredth of a second foot, for a flow of one-hundredths of a second foot would deliver two and three-fourths acre feet in approximately four and a half months. But it may very well have been understood that while the nominal irrigation season extended from April 1st to November 1st, as a matter of fact

the actual season is much shorter, and in that view the discrepancy is more formal than real.

“In paragraph six it is agreed, upon behalf of the state, that no application to enter land will be approved unless the applicant shall have entered into a contract with the Company ‘for the purchase of sufficient shares of water rights’ for the irrigation of the land, ‘said shares or water rights to be evidenced by the stock of the Salmon River Canal Company.’—language which makes additionally clear the fact that the Company was selling water rights, not merely certificates of stock in another corporation. In the same paragraph is found an agreement that priority of application for water rights, or priority of entry and settlement, shall not confer upon the settler priority of right in the use of water. This stipulation is not to be taken as implying an understanding that water rights might be sold in excess of the normal capacity or serviceability of the system, for it is to be read in connection with another clause in the same paragraph providing ‘that to the extent of the capacity of the irrigation works and to **the extent of the water rights to which it is entitled**’ the Company shall sell or contract to sell water rights; and the last part of paragraph nine, which expressly prohibits the sale of water rights ‘beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor.’ This provision against priority of right was doubtless inserted to cover seasons of abnormally low water, and to forestall the claim that might be set up by the earlier settlers that they were entitled to be supplied to the full extent of their rights, to the exclusion of later settlers, at any time when, due to such abnormal conditions or to some casualty, there was insufficient water fully to supply all rights. In that view the several provisions of the contract are in harmony, and all are given effect; whereas, if the defendants’ contention be adopted, not only is the express language of the settler’s agreement set at naught, but the clauses last above quoted from the state contract are

rendered meaningless. For if the settlers' contracts convey no specific water rights, but only undivided interests in the system, it is manifest that such water right as the Company possesses never could be exhausted or exceeded, for any right, be it large or small, is capable of division into an infinite number of shares.

"In paragraph eight is found the following provision: 'Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-hundredth (1-100) of one (1) cubic foot of water per acre per second of time, and each share or water right sold or contracted to be sold as herein provided shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said canal.' Standing alone this language is susceptible to a construction tending to support the defendants' contention; but it may also be read entirely in harmony with the settler's contract. Under the familiar rule that a printed form of agreement will be construed most strongly against the party by whom it is prepared, the doubt here would have to be resolved against the Company, even if we had nothing but the state contract. And why, it is pertinent to ask, should the State have so carefully insisted upon a canal capacity of one-hundredth of a second foot per acre if the water was not to be supplied up to practically that capacity? It would seem to be wanton waste to build a canal twice the size needed. It is futile to say that an additional capacity might have been required for the rotation system of delivery, the possibility of which was contemplated, for, under such a system, the flow in the main canals and laterals is not necessarily variable, the fluctuation or periodic use is only in the sub-laterals and individual ditches.

"In paragraph ten provision is made for the organization by the Company of the Salmon River Canal Company, and the transfer to it of the ownership and control of the system, and

for the issuance to the settlers of a share of stock therein for each acre of land for which a water right is sold. The capital stock of the company, it is stipulated, shall consist of 150,000 shares, 'which amount,' such is the provision, 'is intended to represent one share for each acre of land which may be hereafter irrigated from said canal.' But while this provision is made for the possible irrigation of 150,000 acres, there is no right or license implied to sell water rights in excess of the available supply of water, whatever that may turn out to be. Plainly the clause is to be read together with the limitation in that respect already discussed.

"It is sought to attach significance to other language found in paragraph ten, to the effect that water is to be delivered for irrigation purposes in such quantities and at such times as the condition of the crops and the weather may determine. By its very terms this provision is made to relate only to the period during which the Company shall have charge of the system, before it passes into the control of the water users. But putting aside that consideration, manifestly the regulation pertains not to the measure of the settler's water right, but only to the method of giving such right its greatest efficiency. Probably never before in Southern Idaho, save in some exceptional case, had water been given so high a duty as one-hundredth of a second foot to the acre. In the early history of the state at least one-fiftieth of a second foot was generally recognized as being necessary, and in more recent years, upon the more expensive projects, the duty was more or less frequently increased to one-eightieth of a second foot. It is reasonable to assume, therefore, that both the officers of the Company and the State Land Board realized the necessity of adopting economical methods for distributing and applying the water, if the allotment of one-hundredth of a second foot was to prove sufficient and satisfactory. Undoubtedly rotation of use is superior to the more primitive method of continuous flow, and therefore the Company was authorized, so long as

it remained in control, to establish such system and accordingly to deliver the water to which the settler was entitled at such times and in such quantities as would best supply his needs; but in thus providing for an efficient method of delivery no authority was implied to reduce the aggregate amount or volume to which the settler is entitled. Therefore the provision, even if it could be regarded as of continuing force, in no wise tends to qualify the settler's right as the same is defined in his contract.

“Perhaps in greater detail than the reasonable length of a judicial opinion would ordinarily warrant, I have now brought under review all the clauses of the State contract which can be deemed to give even the most remote support to the defendants' contention; and it is submitted that they present no real conflict with the settler's contract. Upon the other hand, we find upon further examination that in its most vital feature the precise language of the latter is expressly authorized by the former, for in paragraph ten of the State contract it is directed that ‘the certificate of shares of stock of the Salmon River Canal Company, Limited, shall be made to indicate and define the interests thereby represented in the said system, to-wit: A water right of one-hundredth of a cubic foot per second for each acre of land irrigated, as provided in paragraphs IV. and VIII. of this contract, and a proportionate interest in the said canal and irrigation works, based upon the number of shares ultimately sold therein.’ Moreover, by its reference to paragraphs four and eight, this provision illuminates their meaning and brings them clearly into harmony with the settler's contract. It is accordingly concluded that the theory of a sale only of undivided interests is untenable.

“Now shifting their position, the defendants say that if anything more than an undivided interest was sold, it was not a specific amount of water, but only a right to use such quantity from time to time as might be reasonably necessary

to supply the settler's needs. Such presumptively must have been the intention of the parties, so it is argued, for a contract for a definite water right, if not in contravention of the constitution and statutes, is opposed to the policy of the State, in that the only right the individual can acquire in water is the right to apply it to a beneficial use, and inasmuch as needs are always variable and fluctuating, title to a definite or specific quantity of water cannot be granted or acquired. Such plausibility, however, as the reasoning may have is due to a confusion of terms, and a consequent confusion of ideas. It may be conceded that the waters of the State belong to the public, and that the private right which the individual acquires by appropriation or purchase is usufructuary only, and further that at any given time the extent of his reasonable need is the measure of the maximum amount he is entitled for the time being to divert from the stream or to receive and use. But this is not to say that in the exercise of ordinary prudence the owner of land may not, by appropriation or contract, provide himself with an available supply which shall be subject to his demand at all times when he has need therefor. Were the defendants' contention to prevail, the existing uncertainty and instability of titles to water rights would give place to utter chaos. If, for the reasons counsel advance, it was incompetent for the settler to contract for a specific right, it was equally incompetent for the Company by appropriation to acquire any specific or definite right. Water decrees adjudicating the extent of appropriators' rights would be of no effect, and that which the defendants are urging here, namely, a determination of the duty of water, would be an idle thing, for what the farmer needs this year for the proper irrigation of his crops may be too much or too little for the coming year. A contract for a specific amount no more warrants or encourages wasteful use than does a judicial decree or State Engineer's permit. The possibility that the settler may not at all times be able to use the maximum of his available right,

whether such right be acquired by appropriation or by contract, is without significance. That is only to say that, in that event, and for the time being, the water becomes subject to use by others having inferior rights. I know of no consideration of public policy opposed to the exercise by farmers of that degree of prudence which is expected of men in other vocations in providing a margin of safety to cover contingencies. What would be thought of a hydro-electric company furnishing light and traction facilities to an urban community, if it relied upon a power installation just sufficient to meet the needs of the community in normal years, without any margin of safety to cover the contingency of low water or of casualties known to be incident to such an enterprise? If the settler's right is barely sufficient for his needs in the ordinary years and in the absence of mishaps, manifestly he must suffer loss when the run-off falls below the average, or when, through accidents to the system, there is partial or temporary loss of the use of water, or when, because of light precipitation and other weather conditions, the need of water is unusually large. Ordinarily for the farmer not to make provision against such contingencies would be counted against him for carelessness. So far as I am aware, it has never been held or contended that in making an appropriation of water from a natural stream the appropriator is limited in the right he can acquire to his minimum needs, and no reason is apparent why one who contracts to receive water from another should be limited to such needs. Conservation of water is a wise public policy, but so also is the conservation of the energy and well-being of him who uses it. Economy of use is not synonymous with minimum use. Better four prosperous farmers than five who are unsuccessful because of the uncertainty in the water supply, and better four farms uniformly fruitful than five upon which failure is ever imminent, and to which it is bound to come on the average one year in five.

"Now if the contract is lawful, and if therefore the Company could and did contract for the sale of specific rights, and

if such rights were not to be sold in excess of the water supply, what is the quantitative measure, if any, provided by the contracts for such rights? We have seen that the sale was of 'one-hundredth of a second foot' to the acre, and ordinarily, it is to be conceded, if this phrase were used with reference alone to a water right in the natural flow of a stream, it would be accepted as a sufficiently clear and complete description in itself. It would impart a right in the owner at any time he had need, and so long as he had need, to divert and use a stream of the magnitude thus described. The question of the quantity of water, in cubical measure, would rarely arise, for no one would be interested in calling it up. But here the outstanding feature of this system is the reservoir, and obviously in estimating the acreage capacity of a reservoir we must not only have the size of the stream to be delivered per acre, but also the length of time it is to run. Upon this point of time, it must be conceded, the contracts taken together are not wholly free from ambiguity. If we dismiss, as I think we may, without discussion, the idea that either party has the power to determine the period to suit himself, there are left three possible alternatives. We may couple the one-hundredth of a second foot with the duration of what is designated as the irrigation season, that is, from April 1st to November 1st of each year, and conclude that the settler is entitled to receive a total quantity of water equal to continuous flow at the rate of one-hundredth of a second foot per acre for the entire season, which would amount to approximately four and one-fifth acre feet. In this view the settler who uses no water during the months of April and May could double the supply to which he would ordinarily be entitled during the months of June and July. While the language of the contracts is susceptible to such a construction, it is doubtful whether at the time they were executed any water rights had ever been so defined in this section of the country, and it is wholly improbable that either party contemplated such a radical departure in irrigation practice.

“A second view is that we may reject the period of the irrigation season as not having anything to do with the question of the quantity of water, but only as establishing the limits of time beyond which no water could be furnished, and adopt the theory that one-hundredth of a second foot was to be delivered during this period at such times only as the settler's need required, without the right on his part to hoard or save for the future by failing to use continuously, and hence without the right at any time to demand a flow in excess of one-hundredth of a second foot per acre. Such a right would be closely analogous to that of one who, as an original appropriator, is decreed at the rate of one-hundredth of a second foot per acre of the natural flow of the stream; he would have the right to divert that amount continuously up to the limit of the beneficial use to which he could apply it, but he could not, by refraining from use today, divert twice the amount tomorrow. The difficulty about this view is that it fails to take account of the necessity of measuring the reservoir, and hence leaves hopelessly uncertain one factor essential to the computation of the required capacity of the system as a whole. But not only here is that one of the vital questions, but it is reasonable to suppose that the parties had it more or less definitely in mind when they entered into the contracts.

“A third view, and one which in many respects is identical with the one just discussed, but which covers the point last noticed, is that a right was contemplated sufficient to enable the settler to receive water at the rate of one-hundredth of a second foot per acre continuously during the season of actual irrigation needs, the amount of which the parties estimated and understood to be two and three-fourths acre feet; and this view I am inclined to adopt. It is not at variance with any of the terms of the contract, it gives a measure of effect to all, and is in conformity with current and general irrigation practice in the State, with reference to which it may be assumed the parties contracted, and furthermore entails no

unreasonable results. The parties doubtless understood that while it is provided that water could be demanded at any time between April 1st and November 1st, demands in April and October would be exceptional, and in May and September generally very light and that it was therefore reasonable to assume that on the average a resource of two and three-fourths acre feet would be sufficient to supply the settler's right of a continuous flow during the irrigation period, of one-hundredth of a second foot per acre. Practically, therefore, and in effect, the provision in the State contract with regard to the two and three-fourths acre feet is not inconsistent with or a limitation upon the definition of the settler's right embraced in his contract, namely, a right to receive one-hundredth of a second foot during the season of his need for water; it is merely the expressed understanding of the parties touching the total amount of water the Company must have available in order safely to provide for this need and thus to comply with its contract. In effect it amounts to an agreement by the Company that it will make provision for that quantity, and an agreement upon the part of the State and the settler that such provision will be accepted as full compliance with the obligation to supply the settler up to the limit of his needs at the rate of one-hundredth of a second foot per acre during the entire irrigation season from April 1st to November 1st. In this way upon the one hand the right of the settler is defined, and upon the other the duty of the Company is made clear and specific. The latter could not legitimately sell water that it did not have, and when at the rate of two and three-fourths acre feet per acre it had sold up to the available supply in its reservoir, as supplemented by the natural flow of the stream during the irrigation season, it was bound to stop.

“There is no force to the argument by which the defendants attempt to array against this view the provisions of paragraph ten of the state contract, authorizing rotation of use, and delivery ‘in such quantities and at such times as the condition

of the crops and the weather may determine.' Note has already been made of the fact that these provisions are temporary only, and are in terms limited to the brief period of the Company's control and administration of the system, and the whole argument might properly be dismissed with the suggestion that we are led into confusion rather than into clarity of reasoning by doing violence to the language of the contract and arbitrarily assuming that these provisions are upon the same footing with others of a permanent character. But if for the sake of the argument we join with the defendants in indulging this unwarranted assumption, the general conclusion here reached is in no wise affected. It is plain that the two classes, the one providing for one-hundredth of a second foot per acre, and the other for 'such quantities * * * as the condition of the crops and weather may determine,' if relating to the same subject matter, cannot stand together; one is constant and the other variable, and plainly as measures of a single right or duty they are inconsistent. The one must be understood to pertain to the extent of the right and the other to the method of delivery. But how can we say that the settler's right is the right to receive such amounts of water and at such times during the irrigation season as the condition of his crops may require, and at the same time say that the water is to be delivered to him at the rate of one-hundredth of a second foot per acre? That would be a contradiction of terms. Upon the other hand, to say that the right is to receive water at the rates of one-hundredth of a second foot per acre, flowing continuously during the actual irrigation season, the amount thereof being estimated at two and three-fourths acre feet, and that this amount be delivered from time to time in such quantities as the conditions require, is to define the right and to prescribe a method of delivery involving no contradictions or inconsistencies, and no departure from the best irrigation practice. As already noted, this latter view is the only one under which these clauses in paragraph ten, treated as permanent provisions,

can be given effect without rendering inoperative other clauses of the contract, and in this view they are in no wise opposed to the theory of a definite and specific water right. It is scarcely necessary to add that if the view I have taken of the meaning of the contracts is correct, the duty of water, when applied in accordance with principles which are coming to have the sanction of scientific experimentation, is an immaterial inquiry. The rights of the parties are defined by their written agreements, and even if upon investigation we should find, in harmony with the popular view, that one-hundredth of a second foot is quite inadequate, no relief upon that account could be granted to the plaintiffs. So upon the other hand, and for like reasons, a finding that the settler could get along with something less than that amount would not furnish ground upon which to relieve the defendant company from its contractual obligations. Whatever may be the proper duty of water, we cannot make a new agreement for the parties. If the right granted is too great, and the settler attempts to use water wastefully, that is a matter of which the State and other appropriators upon the stream may complain; it is no concern of the defendants. The terms of the agreement were fixed by the Company, not by the settler; presumably the latter was induced to obligate himself to pay the price in the expectation that he would get the promised water service. It may be assumed that at the time the contracts were negotiated the Company deemed it impracticable to adopt a higher duty for water, and thought that few would be willing to undertake to reclaim the land, and in many cases to risk their all, without the assurance of at least the supply agreed upon. They are entitled to receive what they contracted for. It is to be borne in mind that the evidence touching the duty of water was not offered for the purpose of illuminating the meaning of the writings. Possibly knowledge of what at the time they were executed was generally understood to be a reasonable amount of water for irrigation needs might be of some assistance in determining the meaning the parties attached to the phrase-

ology employed, but manifestly the present views of scientific experts and skilled specialists cannot be considered for that purpose, and in that view the evidence was excluded from present consideration.

To summarize, the contract, as I have construed it, runs counter to no provision of the constitution, no statute, and no principle of public policy. The right provided for is no more specific than that defined and established by a judicial decree or by a proceeding before the State Engineer in favor of an original appropriator. The construction no more authorizes or permits wasteful use than does a decree or a State Engineer's permit. It eliminates inconsistencies and gives effect to all the provisions of the agreements. Not only is it in accord with the plain import of the language employed, but it is strongly supported by the surrounding circumstances. As we have seen, the Company had confidence that the stream would supply a sufficient amount for 150,000 acres and it procured a permit sufficient to provide at the rate of one-hundredth of a second foot per acre for that area. At that time water rights were customarily appropriated, decreed, contracted for, and sold, as definite quantities, and with rare, if any, exceptions, the amount deemed to be necessary, both popularly and by the courts, exceeded the amount here provided for. In the light of these circumstances the contract must have appeared to be a reasonable one for the Company to make, and no argument of improbability is available as a ground for qualifying the meaning which the phraseology naturally imports.

"If then the settler is entitled to receive one-hundredth of a second foot or two and three-fourths acre feet per acre, it stands conceded that the Company sold, and has outstanding, contracts very greatly in excess of the capacity of the system. Just what this excess is I do not at the present juncture attempt to determine. Aside from the consideration that the period during which we have accurate information touching the run-off of the water shed is comparatively short, and therefore the data inconclusive, a definite finding upon this point

should await the final determination of claims of other appropriators upon the stream, which are now in the course of adjudication in this court. Prior rights are asserted under these claims, and they are of such magnitude that no reliable computation can be made of the amount of water probably available for this project in normal years, until their status and dignity are determined. It is also highly desirable, if not wholly indispensable, that we have the benefit of further experience and observation touching the amount of seepage which may be permanently expected in both the reservoir and the canals."

CONTENTIONS OF COMPANY.

First, taking up the brief for appellant Land and Water Company, there are certain statements of fact, or assumptions, perhaps, not warranted by the record, more especially the statement regarding the diminished area of the project (p. 7). But if counsel for appellants are correct in their construction of the contract, and in their claim that they have sold no specific water right, what difference can it make as to the area of the project, and why are they desirous of showing a net area of but 57,348 acres?

If our "perpetual" water right guaranteed under the statute is a right to get what we can each year, as distinguished from a right to receive a specific amount, there is no reason, insofar as we are advised, why the Company should not proceed to sell the remainder of the 150,000 acres included in the segregation.

We will here group the various contentions as gathered from brief of appellant, and it will be observed in this connection, the strange position counsel assume by not stating precisely what the Company **did** agree to do under the terms of its contract, rather than what it **did not** agree to do:

1. "It never made any contract calling for the delivery of any of the amounts of water specified in the bill" (p. 10).

2. "It is a construction company only."

3. "The interest of the settlers under the statute is proportionate."

4. "That the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres)."

The last proposition is something not involved in a construction of the contract, but rather a reason urged by appellants why the order of the Court should be set aside.

We will attempt to follow the contentions of appellant as enumerated.

First: Having heretofore set forth the construction of the trial Court upon the contract, we feel there is little to add upon such question. Analysis of this question first asks whether a water right was in fact sold. The statutes of the Federal Government and the State, as well as the plain provisions of the State and Settlers' contract, answer this.

Next, if a water right was sold, was any specific amount sold, and if specific, what amount?

The contention numbered three (3) states the claim of appellant; the settlers upon the other hand, claim a sale of a specific amount. And in this connection we should keep in mind the duty imposed upon the State by the Federal Act to secure for the reclamation of the lands "an ample supply of water," which duty was in turn recognized by the State statute wherein it was to be determined "whether the capacity of the proposed works is adequate to reclaim the land described," (Sec. 1618).

If it be the claim of appellant that the settlers are to reclaim the lands by "capacity," rather than water, there is reason in their contention; but the State contract, presumably in compliance with the provisions of law quoted, provides:

"that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, **has been determined to be sufficient** to furnish two and

three-fourths acre feet of water per acre for each acre of land to be irrigated."

What was the necessity of such "capacity" unless the water to be so conserved was to be delivered in the amount so agreed upon as "sufficient?"

Why the "capacity," unless such storage became necessary to enable the Company to deliver the amount determined "sufficient" and adequate for each acre of land to be irrigated?

Second: There is no question but what the Company was a construction company. It had, however, additional responsibilities. Sec. 1621, Rev. Codes, Idaho, relating to the provisions of the contract which shall be entered into between the State and the Company provides:

" * * * the price and terms per acre at which such **works** and **perpetual water rights** shall be sold to settler * * * "

Even though it be a construction company, does this fact create or constitute an immunity from delivering what it sells? Or prevent the application of the ordinary rules of law as to performance of its obligations and contract? As a construction Company it was to receive a price for "works" and "water right;" can it deliver one and not the other and claim performance? We feel we can safely pass this contention.

Third: "The interest of the settlers (in the water) under the statute is proportionate." Appellant under this contention cites Sec. 1615, Rev. Codes, Idaho, and also refers to the subject at various other places in the brief, which the appellate court will undoubtedly discover. We urge the proposition that the Statute referred to does not bear any such construction. The Statute which relates to the proposal to be submitted by the construction Company says:

"* * * It shall state the source of the water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which **perpetual water rights** will be sold to settlers on the land to be reclaimed, said perpetual rights to **embrace a propor-**

tionate interest in the canal and other irrigation works.”

* * *

Also in the settlers' contract (p. 64), the purchaser is entitled "to receive one-hundredth of a cubic foot of water per acre * * *" and "this certificate also entitles the owner to a proportionate interest in the dam, canals, water rights, etc."

To sustain the contention of appellant under a construction of the statute, the "proportionate interest in the canals" must embrace and include the "water right" agreed to be sold, instead of vice versa. In other words, this first provision of the statute loses its identity and significance by being merged in the second or additional provision. And the same reasoning applies to the terms of the contract. The agreement that the contract holder shall have the right to receive anything is ignored if not emasculated, and his entire right, as defined by appellant, is a "proportionate interest in the dam canal, water rights, etc."

Fourth: Taking up the fourth contention. "that the existing water supply is entirely sufficient for the irrigation of the project under its diminished area (57,348 acres), and it (the Company) desired to show this fact conclusively."

In the first place this assumes a fact regarding the area which does not exist. The facts are that not only at the date of trial, but up until the present time the Company has contracts outstanding to the amount of 73,348 acres. And if the rights of appellants under these contracts are what they claim for them, it does not lie within the power of the State or any Court, to abrogate or cancel one of these contracts. It is true that 16,000 or more acres has not been cultivated; but these lands are subject to contest under the State laws

It would seem that this fourth contention of appellant completely exposes the fallacy of the position they assume in this case, not only as to their claim of not having sold a water right in any specific amount, but upon the "proportionate interest" theory as well.

If they have sold no water right, upon what theory did they desire to offer proof of having sufficient water to irrigate 57,000 acres?

If they only sold a "proportionate interest" in the system, the settler takes what the system may afford regardless of whether 57,000 acres could be supplied or only 10,000 acres.

And under this head, we wish to enquire by what right and under what authority—whether statutory or contractual—has the segregation and the area covered by water contracts been reduced to 57,000 acres? According to claim of appellant the State had determined the sufficiency of the water right for 150,000 acres, and the contract executed by the State and by the Company contemplated such irrigation and reclamation. Now it appears that the company was first limited in its sale of water rights to 80,000 acres and proceeding under such limitation, 73,000 acres have been sold. Now we are told the area has been further diminished to 57,000 acres and that appellant has proof that such area can be irrigated.

How can the area be reduced? Sec. 1628, Rev. Codes, Idaho, provides among other things that within two years from the time the person contracting with the State "shall have notified the settlers under such works that they are prepared to **furnish water** under the terms of their contract with the State," the settler must actually cultivate and reclaim not less than one-eighth of the lands filed upon, and having performed this obligation may go before an officer of the Land Board and "make final proof of reclamation, settlement and occupation, which proof shall embrace **evidence** that he is the owner of shares in the works which entitle him to a **water right** for his entire tract of land sufficient in volume for the complete irrigation and reclamation thereof;" whereupon, if such proof is satisfactory to the United States and the State, patent issues first from the United States to the State, and then from the State to the settler.

Under Sec. 1631, Rev. Codes, the Land Board has the right to make rules suitable to the enforcement of the Act generally,

and among these rules we find authority there given "for the forfeiture of entry by settlers upon failure to comply with provisions of this chapter."

The rules of the Land Board adopted pursuant to the provisions of the section provide for contest of any entry where reclamation has not been made as by law required.

Rule 26, Carey Act. R. and R.

But this does not cancel the water contract, or withdraw the entry from the segregation. It simply takes the entry from the one failing to comply with the law and permits the contestant or another person to re-enter the land and succeed to the rights of the previous entryman under the water contract. It is obvious that this does not in any way reduce the area to be irrigated or cancel any water contract. And in this connection if the Company actually had the water which they have agreed to sell and deliver, and a reduction of the area was attempted, either by the State or otherwise, it is not difficult to determine what position the Company would take and objection make. Now does the fact that they have insufficient water alter the rules, or change the contractual rights of the parties?

Another consideration in this connection: Under the law the entryman was required to make proof under oath that he had a sufficient water right to reclaim and irrigate his entire entry. In view of the record in this case it must have been apparent to the entryman as early as 1912 that there was some question as to the sufficiency of their water right; this doubt was emphasized by the experience of 1913, was made a practical certainty by 1914, and 1915 served to make it absolute.

Were the entrymen of the 16,000 acres then compelled, in the light of the facts, to go upon the lands, make their investments requisite to reclamation, in order to prevent the cancellation of their rights and thereby sustain the financial loss which the others have suffered; and to do these things when they knew they could not make the proof which the law required because they did not have what the law said they must have? If they

were required to make proof of something they knew to be false, and thereby unable to make the reclamation required by law, even though by some method of reasoning their entries might be taken away from them, have their water contracts been cancelled?

So we are curious to have counsel explain the precise method by which their liability to furnish water has been reduced to 57,000 acres.

We might, perhaps, add a fifth contention, because of the specification of error suggested by appellants, to-wit: that the Court should have received evidence regarding the duty of water upon the project. The trial court rejected this proof upon the ground that the contracts covered the point and the parties litigant having agreed in their contract as to what water should be delivered, the testimony offered became immaterial.

It really does not require analysis to determine the correctness of this rule. Imagine the surprise of the contract holder, after having entered into a contract for what he believed to be a specific amount of water, to be brought into court and have his right to receive water determined by the testimony of experts and others as to what the duty of water should be, and as a consequence, what he should receive.

It certainly does not lie within the power of the defendant to make any complaint as to the duty of the water; nor is the State in a position to make complaint as suggested by appellants in their brief. This, for the reason that the State was a party to the original contract, which provided, according to our interpretation, that the settlers should be furnished two and three-fourths acre feet of water.

Appellants further complain that the record does not justify the Court order, because there was no showing that plaintiffs have received an insufficient amount of water and have not been damaged; and conversely, that the defendants were prepared to offer proof as to the duty of water, and that such proof would show that sufficient water was available for the irrigation of 57,000 acres; and that, upon this theory, plaintiffs

not having shown injury or damage—the order restraining the defendants for collecting moneys claimed to be due was improperly granted.

But the question as to whether water in sufficient quantities was or could be delivered, is not the only test. The record does sustain the fact, as we believe, that plaintiffs purchased a sufficient water right; that water contracts were outstanding for something in excess of 73,000 acres; that all of such contract holders had the right to receive the water specified therein; that the area under cultivation upon the tract might increase year by year until the full amount of 73,000 acres was brought under cultivation and the owners of such land were claiming the right to receive the water under their contracts. The question then was as to whether, in view of what the record disclosed might and could happen, the entryman should be compelled to pay or continue paying the purchase price for a water right which it was manifest they could not receive? This was the irremediable damage and wrong complained of.

If the contention of the Company is correct, it has the right to enforce the payments as they mature under the contract in the face of the obvious fact that the water purchased cannot be delivered, and yet say that there is no wrong of which the settlers can complain. We believe no stronger showing could be made justifying the interposition of a Court of equity and requiring such Court to restrain the collection of the purchase price for something not delivered, which can not be delivered, and which the Company had refused to deliver.

STATE DECISIONS.

Insofar as the state decisions are concerned, and upon which counsel rely, we wish briefly to refer to the cases mentioned, and more especially to the case of *State vs. Twin Falls Canal Company*, 21 Idaho, 410; and in this connection we wish particularly to call the Court's attention to the dissenting opinion of Chief Justice Stewart, which fully sets forth the facts and issues involved.

The action was one for a Writ of Mandate brought in the Supreme Court of the State to compel the Canal Company to issue water stock upon lands lying within the segregation, although the action was brought in the name of the State as plaintiff. The plaintiff in the action, in substance, set forth the contract between the State and the Construction Company, claimed that water had been filed upon for the irrigation of the entire segregation, including the lands for which shares were asked, and the fact that the water was sufficient for the irrigation of all such lands, and that the full water right, as evidenced by shares of stock in the Canal Company had not been disposed of.

The Canal Company answered these allegations, admitted that the full number of shares had not been issued and specifically denied that there was any water available for use under the shares sought to be secured by the Writ, alleging as an affirmative defense, that there was no water available to supply the land which such stock would represent, and that all of the water rights in the system had been sold. The dissenting opinion then goes on to state "In the face of this denial, the majority opinion holds that this denial presents no issues whatever, and that the defendant is not entitled to a hearing thereon, and the opinion holds that there is surplus water unsold and that stock representing shares of water may be sold and directs that additional water rights be sold to the plaintiff for the lands by him purchased." Thereby resolving the issue so presented in favor of the State.

The majority opinion, notwithstanding the clear cut issue presented by the pleadings, held that there was no necessity of proof under the issue because the State and Company had determined before the execution of the contract, that 3,000 second feet was ample to irrigate the segregation. In other words, the opinion of the Supreme Court proceeds upon the theory that because the State in passing upon the question preliminary to the entering into the State contract between the State and the

Construction Company, had said that there **was** sufficient unappropriated water to irrigate all of the lands included within the Twin Falls segregation, therefore, of necessity, and as a matter of right under the contract, the water must be ample for all of the lands and the Canal Company must issue such stock.

The very issue was joined in the West case and presented to the Supreme Court which was presented in the case at bar and which appellants now claim should have required the introduction of evidence, and the determination of the fact as to whether or not there was water which would justify the issuance of the stock as prayed for in the Bill.

The vast difference between the West case and the case at bar becomes apparent when we consider that in that case the Company actually had the 3,000 sec. ft. to deliver which the State and Federal governments had held, and which the State court says they must have held, to be sufficient to irrigate the entire 240,000 acres; while in the case at bar we have only the "capacity" as distinguished from the water; and instead of having a 1500 sec. ft. flow, or a flow sufficient to impound "180,000 acre feet of water, which amount, in addition to the normal flow of the stream during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre," we have about one-fifth of the supply contemplated.

This being true, did either the State or Land Department of the United States pass upon the sufficiency of the water supply as the facts warrant, so that the following language of the West case applies:

"The Land Department of the United States must have considered those facts before it came to the conclusion that said amount of water was sufficient to reclaim said land. If it had not come to that conclusion, it would not have segregated the land included in said project on the showing made by the State. The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not

have entered into said contract for the construction of said irrigation system. And, further, there is nothing in the record to show that said amount of water is not amply sufficient to properly irrigate all of said land if used in turn by the owners of the land or under a proper system of rotation."

In other words, what facts, as distinguished from what has proven fiction, were considered by the Government or State authorities? What facts of existing physical conditions were considered to the end that such consideration should be binding upon any one?

In the West case, the Court says:

"The State Land Board must have concluded from those facts that the water appropriated was sufficient for the reclamation of said land, or it would not have entered into said contract for the construction of said irrigation system."

That there is a vast difference between an actual appropriation of 3,000 sec. ft. of water from a stream where it is actually present and susceptible to appropriation, and the filing of an application for a permit to appropriate 1500 sec. ft. of water which does not exist, no one better than this Company can vouch for.

And the physical fact of such actual appropriation in the West case is the predicate for the decision. Now what the Court actually held in the West case was, that the 3,000 second feet appropriated was determined, by those whose right and duty it was to pass upon the matter, to be sufficient; if by seepage and evaporation losses in delivery a greater amount of land than then represented by water rights sold could not be served by giving to each user the full amount contracted, and having in consideration the facts and circumstances surrounding the parties at the time the contract was made. the Court reasoned that it must have been within the contemplation of the parties that the settlers' should bear such seepage and evaporation loss, because the water appropriated was deemed suf-

ficient to irrigate all the lands, and hence, required the Canal Company to issue the additional stock. Then, too, the appellate court was undoubtedly persuaded that much of the water was picked up by lower users and hence the loss would be nominal rather than substantial. The word "appropriated" as used in the West case means something more than intent.

There is another question we believe material in consideration of the contention of appellants as to the holding in the West case. In that case, as we have found, the water sought to be appropriated was in fact appropriated and diverted into the canals of the Company. The Land Department of the United States having, by segregating the land, agreed that such water should be sufficient to reclaim the same, and has issued patents for said land. But how does the settler upon the Salmon project proceed to secure his patents? We have no water and were not sold any. The water which was supposed to be in the stream was not there. Will the fact of the water not being in the stream be persuasive as a reason for the United States issuing a patent for lands reclaimed under the Carey Act? Is reclamation the test, or is the expectation that the lands would be reclaimed sufficient? Such expectation being predicated upon the representations of unreliable promoters or dishonest or incompetent State officials, or both?

If the West case means what appellants contend, we are forced to the conclusion that the State and Company have agreed that the water available, whatever it may be, shall be sufficient for the irrigation of all the lands included in the segregation; that the Company is only a construction company and has no duty to perform, and hence no liability predicated upon such duty in connection with the water rights or sale thereof, and that the settler receives a proportionate interest in the system, be it one with or without water. There is no place to stop, short of this conclusion, as the question of degree cannot enter into the equation. In other words, the Company has completed its contract according to the reasoning and conten-

tion of appellant, when it has constructed an irrigation system, regardless of results.

But there is another and later Idaho case which may throw some light upon this matter, and is instructive, as the facts in that case and the case at bar are similar in many respects. The case of Childs vs. Neitzel, 26 Idaho, 116, and not referred to by either of the counsel for appellants, insofar as we have been able to discover, holds among other things:

“1. Where a Company is incorporated for the promotion of an irrigation scheme and to construct an irrigation system consisting of reservoirs, dams and ditches, such corporation enters into contracts with persons having land within such project, to furnish them water at an agreed price per acre, divided into annual payments, with interest on deferred payments, and agrees to complete such system within a certain time and furnish the purchasers of water rights with water, and agrees to turn such system over to such purchasers of water rights after its completion, and thereafter mortgages its interest in such system and water right, and also assigns such water right contracts as security for borrowed money, which money is used in the construction of such system: held, that the person loaning the money only acquires such rights and interest as the irrigation company has in such a project and such water contracts, and cannot collect the payments that become due after the time has expired for the completion of such irrigation system and the delivery of water until the said system is completed and the water delivered in accordance with the terms of the water right contracts.”

While this case did not involve a Carey Act Company, so-called, it did involve the construction of contracts similar to the one here in issue, and it will be noted that the Court expressly held that insofar as the original construction Company or the assignee of such Company was concerned, no recovery could be had upon the contracts until the system had been constructed and the water delivered. So that the contractual relations are similar in the two cases and there is a further similarity to be found in the fact that the action was maintained by the person

holding the water contracts of the settlers as security for the payment of a certain bonded indebtedness created by the construction Company.

It was contended by counsel for appellant in that case, as in this, that the corporation was organized solely to provide a system of irrigation of certain lands, and that the "defendant Company was the mere instrument or legal means for providing the lands with water, the cost thereof to be paid by such land owners or purchasers of water under said contracts."

But the Court says:

"We cannot agree with counsel in that contention. The Murphy Company agreed to complete said irrigation system with its dams, reservoirs and canals and turn the same over to the purchasers of water rights within a specified time, the price per acre for such water rights being stipulated in most of the contracts at \$35.00 per acre. The Murphy Company no doubt contemplated making a considerable profit for itself in the construction of said system. It was not an eleemosynary corporation or the trustee or agent of the water right purchaser for the construction of said irrigation system, but was a corporation organized for the purpose of making a profit to its stockholders from the construction of said system. If any profits had arisen to the company from the construction of said system, the purchasers of said water rights could not, under said contracts, share in them with the Murphy company. The Murphy company had employed engineers and experts to examine said irrigation project as to its feasibility, the quantity of water that could be obtained for the irrigation of said land and the cost of the construction of said system to make the water available to the land to be irrigated, and after that was done, an estimate was made of the amount to be charged for each acre water right that would be necessary and sufficient to furnish each purchaser with the amount called for in his water contract, and also was able to construct said system and complete it. Hence the purchasers of water rights under such system had a legal right to depend upon the estimates made by the irrigation company and upon their contracts with it to the effect that the com-

pany would finish and complete the system and furnish the water according to the terms of the contract. They did not purchase under the rule *caveat emptor*."

The Court further says:

"The purchasers of water rights depended upon their contracts as to what the water rights and said system would cost them, and had they considered that their water rights would cost them more than \$35 per acre, they might not have entered into said contracts. It would have been an easy matter to have worded said contracts so as to have required such purchasers to pay the entire cost of said system had that been the intention of the parties. That was clearly not the intention, as the agreement was to pay \$35 per acre for the right, and no more. The Murphy company had agreed to turn over to the purchasers of said water rights certain amounts of water with a canal system completed in such a manner as to make it feasible to irrigate said lands, and until that was done neither the Murphy company nor its assigns could enforce the payment of the amounts that were to become due upon said contracts."

The case came up upon re-hearing and we notice that counsel for the appellant here, the Commonwealth Trust Company of Pittsburg, Trustee, and for A. C. Robinson, were of counsel for appellant upon such re-hearing. The original opinion was adhered to and the Court among other things said:

"While the Murphy project is not a Carey Act project, the contracts entered into with the purchasers of water rights are similar in many respects to those entered into by purchasers of water rights under the Carey Act.

"The amendment by Congress to the Carey Act, approved June 11, 1896, (29 Stats. at L., p. 435), clearly authorizes a lien to be created by the state upon such lands as are granted to the state under said act, and when created shall be valid on and against the separate legal subdivisions of the land reclaimed for the actual cost and necessary expenses of reclamation, and a reasonable interest thereon from the date of reclamation until disposed of to the actual settler, and provides as follows: 'And when an ample sup-

ply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state, without regard to settlement or cultivation.' That provision for a lien contemplates an ample supply of water shall have been actually furnished in a substantial ditch or canal or by artesian wells or reservoirs to reclaim such land in order to create a lien. That is, making water permanently available to the user. Prior to that amendment by Congress to the Carey Act, the legislature of Idaho had enacted a law authorizing and granting a lien on lands and water rights for the cost of reclamation. (See Laws 1895, p. 227; sec. 1629, Rev. Codes.) Said section provides, among other things, that 'Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner or possessor of said land,' etc. The law clearly contemplates that after water has been made permanently available for the irrigation of the land of a water right owner, all deferred payments for such water right shall become a lien on the land and the water right, and such deferred payments may be collected by the owner of such water right contracts in case a court of equity has not directed that such payments must be applied to the completion of the system, and such a case the court may direct all such payments to be made to a receiver appointed by the court to collect the same and complete the system. In case the water contract holders pay the balance due on such contracts, or any part thereof to the receiver, under the order of the trial court, they would be entitled to a credit on their contracts for the amount paid.

"The water contracts in the case at bar make the deferred payments a lien upon the water rights and land; but such liens do not attach until the water has been made permanently available for the reclamation of the land."

The Supreme Court of Idaho having held that the Carey Act contracts were similar to the contract involved in the Childs-Neitzel case, and further, in discussing the amendment of Con-

gress to the Carey Act, uses the language of the Act itself, as follows:

“and when an ample supply of water is actually furnished in a substantial ditch or canal, * * * then patents shall issue for the same to such state.”

What did the Supreme Court mean by holding that an “ample supply” of water must be furnished under these contracts, if the construction of appellant, placed upon the West case, is correct—that is, that the settlers receive but a proportionate interest in what there is to receive, as this proportionate interest might or might not be “ample”?

In the West case, however, the Court held that the State had determined such water supply to the amount of 3,000 sec. ft., to be “ample”; that is, that 3,000 sec. feet actually diverted in that case, had been determined, to be sufficient. Therefore, we say in the case at bar, that had we received the 1500 sec. ft., the amount of water which was determined to be sufficient, our contract would have been performed in this respect, and the “ample supply of water” furnished, which the United States Government requires before patent will issue.

It cannot be said that this “ample supply of water to be furnished” is a matter to be supplied by proof, because all through the West case, the thought runs that this very proof is eliminated because the fact, to which the proof might be addressed, has already been determined by those having authority in the premises, so that we say that the West case, insofar as it affords authority upon the subject, is favorable to the construction placed upon the contract by the trial Court in the case at bar. That this is the holding of the Idaho court in the West case is not only made perfectly clear by the opinion rendered, but is emphasized by the dissenting opinion filed.

The Childs-Neitzel case was referred to with approval in a later case of *Smith vs. Construction Company*, 27 Idaho, 407, wherein the Court said, quoting from the Childs-Neitzel case:

“Construction Companies of this kind will not be per-

mitted to do indirectly what they are prohibited from doing directly. They will not be permitted to make contracts with third parties in regard to the construction or completion of an irrigation system whereby the land owners or purchasers of water rights can be deprived of the rights acquired under their water right contracts; for instance: if a company such as the Murphy Company, fails to complete its system and furnish the water as provided in the water right contracts, or if such company should sub-let the construction of its system and fail and neglect to pay such sub-contractor, the sub-contractor would not acquire greater rights as against the water right purchasers than the irrigation company itself had under its contract with the purchasers of water rights, and could not deprive the purchasers of water rights under such system of their rights, or acquire a right by foreclosure of a lien or mortgage for such construction work as would deprive the water right purchasers of their rights under their contracts."

It is to guard against this very claim of right that the present action was brought, and the interlocutory decree entered. It is the claim of appellants in this case, as it was the claim of the assignee of Murphy in the Childs-Neitzel case, that they have the right to collect the moneys due under these contracts regardless of performance; and it can make no difference in the application of the rule of law announced by the Court, whether the non-performance is to be found in the failure to build a dam or reservoirs, or in the fact that there is no water to deliver--the ultimate failure to receive what the settler has contracted for being the same in either case.

The Bennett case, reported in 27 Idaho 643, 150 Pac., 336, referred to in the brief of appellant, has no bearing on the question here presented, except upon one theory; and upon this question, as we believe, it is an authority supporting our position rather than against it.

That was an action brought in the first instance in the Supreme Court by the holder of a tax deed to certain lands upon a Carey Act segregation, and in which the plaintiff asked that the construction company be compelled by mandate to give to

the plaintiff the water right for such lands, upon the theory that such water right having been "dedicated," as plaintiff claimed, to the lands, such rights thereby passed with the lands under the tax deed.

The facts in the case were that the plaintiff had purchased at delinquent tax sale, a certificate embracing certain lands, and that such certificate had ultimately justified and required the issuance of a tax deed from the County to the lands in question. The original entryman of the lands had only paid the initial payment upon his water contract; he had not paid any of the taxes, and hence the sale of the land for delinquent taxes; it was conceded upon the trial that the purchase price for the water right had not been paid the Company, and the sole question was as to whether, by the use of the word "dedication" in the contracts and statute pertaining to Carey Act lands, such water right passed with the sale of the lands under a delinquent tax proceeding.

It was the contention of the Land and Water Company in that case, that the water right was the property of the Construction company and that this water right could not be taken away from it under any theory of dedication until it had been paid for, or at least, that it was a property right which it might sell and receive pay for, and which could not be taken away from it without the purchase price being fully paid.

In support of this, we quote from the decision: "It appears from the record that the plaintiff is claiming his right to something he has not paid for. He is claiming a water right that was conditionally sold by the Land and Water Company to his predecessor for \$1400.00, for which purchase price he has paid \$120, leaving a balance of \$1280.00. The Land and Water Company expended a vast amount of money in building a canal system so as to enable it to sell water rights and conduct the water to place of intended use, relying upon such sales for its sole compensation for the cost of construction. To have such water rights taken away from it without compensation would

certainly work a manifest injustice to it, and to require the Land and Water Company to protect its water rights by the expenditure of a large sum of money in the payment of taxes on lands that it has no interest in whatever," would impose a burden which it is not called upon to assume.

From the foregoing, at least two points are considered and determined in the case. First, that the water company is selling water rights for the purpose of receiving remuneration for the construction of the works; and second, that such water rights are the property of the Company until fully paid for.

How then can anyone successfully contend that it is a construction company only, and has no interest in or duty relating to the water rights necessarily involved in a Carey Act project? And does it not follow as a matter of course that to enable it to receive the purchase price for such water rights to be sold, it must deliver the very thing which it has agreed to sell, and from which sale it derives the cost and profit, if any, involved in the enterprise.

Nor do we understand, in view of the express language employed by the Idaho Court, why counsel for appellant should say that "it is settled by these decisions, and the law could not be construed otherwise, that the construction company received no pay for the water," when the water in the final analysis is the only thing in which anyone under a Carey Act project has any interest—the instrumentalities employed to divert the water and convey it to the place of intended use being but a means to an end.

So we say in the case at bar, that it is the water that we are concerned in primarily, not the wonderful dam which has been constructed, nor the canals which have been built to conserve and divert the water to our use, as these matters are of secondary importance, and without the water are of no value. Having the water, we can build and arrange for the means and methods of conservation and diversion, but without the water, we can do nothing toward irrigating or reclaiming the lands we have entered under the Federal or State laws.

Counsel for appellant trustee has discussed in his brief to some extent the memorandum decision of the Trial Court in the case at bar, but we are content to submit that decision to this Court, as we feel that it does not require nor permit any attempt upon our part to elucidate or explain. It speaks for itself, and seems to us especially precise and to the point.

The Circuit Court of Appeals of the Eighth Circuit, in the case of McKinney vs. Big Horn Dev. Co., 167 Fed., 770, has had occasion to pass upon the provisions of the Carey Act and the statutes of the State of Wyoming adopted pursuant thereto, and which are practically the same as the Idaho Statutes; in fact, the Idaho legislation was based upon the Wyoming laws. In this case the Circuit Court fully considered the question of the duties and obligations imposed by the Carey Act and State laws upon the Company contracting with the State.

The Court says:

“From all of which it is manifest that the scheme and policy of the statute was and is that the person or company contracting to **furnish the water supply** should make contract with the settler subject to the supervision and control of the Board of Commissioners (State Land Board), charged with the enforcement of the proviso that the water rates to the settlers shall be reasonable ”

In view of this plain construction, how can appellants claim that the “Construction Company receives no pay for the water?”

Again the Circuit Court says:

“Evidently the statute contemplates that the Board would obtain the necessary information of the contract price at which the settler can purchase **perpetual water rights** from the contractor, and not otherwise ”

What does the Circuit Court mean by saying that the contractor sells, and the settler purchases a perpetual water right, if the contractor has no interest in the sale and delivery of a substantial water right to the one paying therefor?

The only other case in the Federal Courts which we have been able to find dealing with Carey Act contracts is the case of the State of Oregon vs. Three Sisters Irrigation Company, 158 Fed., 346. This case agrees substantially with the construction placed upon the contract in the Wyoming case and holds in addition that an attempt to annul a contract made pursuant to the terms of the Carey Act, presents a Federal question.

Passing now to the question of whether the District Court properly restrained the defendants from collecting or attempting to collect the payments due under these water contracts, until they had furnished the water supply contracted for: It can not be successfully contended by the defendants that a wrong has not been perpetrated by the construction company upon the settlers as it is obvious and it appears clearly by the record in this case that the construction company has sold water rights far in excess of the available supply of water it had at the time of such sale. This clearly constitutes a breach of the contract. A wrong having been committed, we believe it would be an established principle of equity that no wrong may be done without a remedy being afforded. Starting therefore upon the assumption that a wrong has been committed and that equity will not suffer a wrong without affording a remedy, we believe that we are entitled to receive the relief granted by the interlocutory order.

It is proper to suggest that this sale of water rights far in excess of the available supply was not brought about either with the knowledge or consent of the settlers, and it would be a strange rule to adopt to hold that the settler was without a remedy, simply because the construction company could not perform its contractual obligation.

Let us assume that the order here entered should be reversed. Precisely what position are the settlers placed in? It appears that they can not get what has been sold to them; that the purchase price of the very thing covenanted to be sold and delivered is being demanded, and that suits in foreclosure

upon these water contracts are now pending. The settlers have the alternative of paying these demands of the company or refusing to pay, and in the latter event, permit judgments of foreclosure to be entered for the full amount of the purchase price of the water right. Whichever course the settler adopts, whether of paying the instalments as they mature, or permitting the taking of their land, the result is the same—they lose substantially their entire investment. The settlers come into Court with clean hands because they are ready, able and willing to carry out and perform their part of the contract.

Analysis of the facts of the case at bar, not only bring the complainants in this action within the statute (Sec. 4329, Rev. Codes, Idaho) but within the fundamental rule of law giving Equity Courts the inherent power to grant the relief here sought. The fact of having purchased something not delivered and being confronted with a demand for payment in full, which payment, if made, will be taken outside of the jurisdiction of the Court, would seem to justify the order of the Court here made; at least until the Court can ascertain what the contract holders will in fact receive. In other words, it is perfectly obvious from the facts in the record, that if the plaintiffs paid at the present time, the full amount called for in the contract, when they ultimately determine just what they can and will receive under these contracts, an action at law to recover the damage so sustained and admeasured and predicated upon the difference of the value of what they purchased and actually received would be futile and barren of results. This is the position the plaintiffs will be forced to take if the order here made and complained of is vacated. Nor is the construction company in a position to complain because the situation is distinctly of its own making, and resulting from its violation of the State contract.

Pomeroy on Equity Jurisprudence, volume 5, Section 54, lays down the following rule:

“The general principles which should govern the Court in the exercise of its discretion have been thus formulated

in a leading case: The plaintiff must show, first, either that he has a clear right to the property itself, or that he has some lien against it; or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and secondly, * * * that the property itself or the income arising from it is in danger of loss from neglect, waste, misconduct or insolvency of the defendant."

As a general rule, a Receiver will be appointed for the purpose of protecting the fund, when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it or removing it out of the jurisdiction of the Court.

Vose vs. Reed, 1 Woods, 647 Fed. Cas. No. 17,011;
Lancaster vs. St. Ry. Co., 90 Fed. 129, 133;
Ryder vs. Bateman, 93 Fed. 16.

There is another cogent reason why the Court should have made the order here complained of, in view of the multiplicity of Suits which will follow and as the various individuals holding contracts will attempt to have their rights determined and their damage fixed, it would seem that the Court was justified for the sole purpose of preventing such multiplicity not only in entertaining jurisdiction, but in holding the matter in statu quo until the rights of all the parties involved can be adjusted. This contention is supported by the case of *Munsey Gas Company vs. City of Munsey*, decided by the Supreme Court of Indiana, reported in 66 N. E. at page 436. In this case an injunction was granted and sustained without any actual damage.

In this case, the Court uses the following language:

"The streets over which it has exclusive power are being used by appellant under a contract with the City that appellant has broken. This would entitle the city to at least nominal damages at law; and its right to restrain the further breach of the contract which amounts to a negative specific enforcement of the contract, can be affirmed on the ground that it will avoid a multiplicity of actions. This is not an independent source or occasion of jurisdiction,

but as laid down by Prof. Pomeroy, where a party is entitled to even legal relief, and there exists between him and a number of others entitled to relief, a common interest, relation or question as against another party that can be determined by one suit, such facts afford a distinct basis for an appeal to equity."

The Court in the course of its opinion also holds:

"A Court of Equity where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted, to the mere chance of damages which a jury may give. * * * it is no answer to say that the act complained of will inflict no injury on plaintiff or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be observed as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being estimated that the acts of the defendant are a violation of the contract entered into by him, the Court will prohibit the plaintiff in the enjoyment of the right which he has purchased."

**Kerr's Injunctions in Equity, Page 533;
Markham vs. Todd, 2 J. J. Marsh 364.**

In *Green vs. Campbell*, 55 N. C. 446, the purchaser was held entitled to an injunction against the collection of the purchase money where the vendor in a warranty deed had no title and was a non-resident and had no property in the State where the action was brought.

To summarize, the appellants are appealing to this Court to reverse an order which prevents them from collecting pay for something they claim not to have sold, namely, a water right; but unless they have sold it, the settlers upon the Salmon project have not purchased the only thing which is of any value to them. Both the Federal and the State Statutes require that the entrymen under these projects have a water right; but make no requirement as to methods or means of diversion, except such as may be sufficient to enable them to reclaim their lands.

That their lands may not be reclaimed with an empty reservoir and a canal system goes without saying. And if we have not purchased a water right as a result of our dealings with this Company, we have not secured the one thing made absolutely necessary and essential under the terms of the Federal and State law. The appellants are not in a position, we say, to complain of this order of the Court. They are bound to concede that the contract made by them has been breached, and as the trial Court provides in the interlocutory decree, the appellants should be restrained from attempting to collect for something which they have sold but not delivered until "trust-worthy assurance" be given that the water sold will be provided. The appellants apparently object to the obligation they must have assumed under the law. And if they were in fact proceeding in good faith, upon the completion of the system in 1911, they would have made application to the United States for patents for all of the lands which the system could have then reclaimed, thereby testing in the first instance, at least, the question of whether an ample supply of water had been placed in a substantial ditch so that patents would issue from the Government for the lands reclaimed. Or they now would comply with the orders of the Court and furnish the "trust-worthy assurance" that their contract would be performed and thereby obviate the necessity of the restraining order insofar as the collection of payments is concerned.

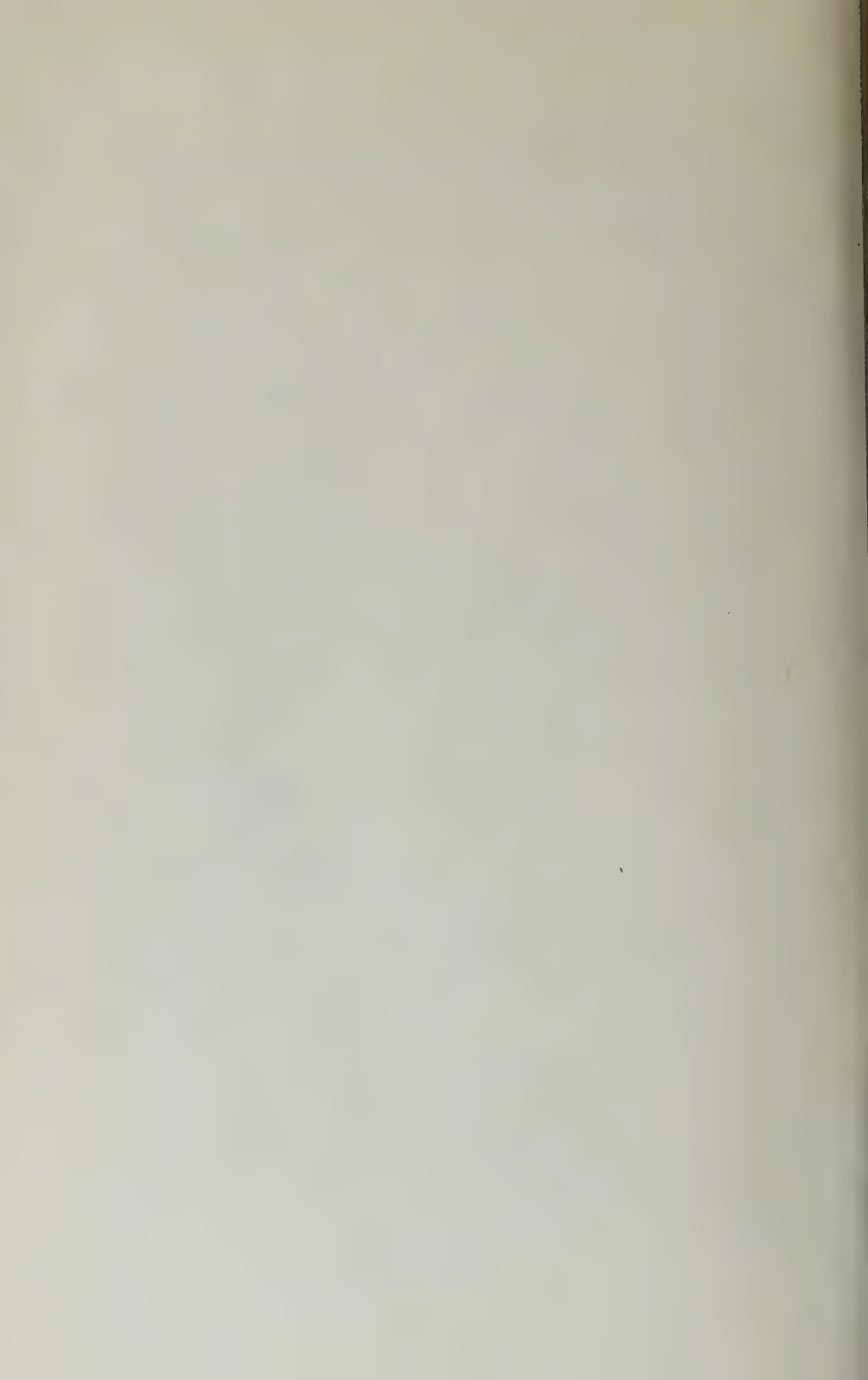
It is the claim of the appellees that all of the equities of the case are with them and that the order of the lower Court should be affirmed.

Respectfully submitted,

C. O. LONGLEY,

E. A. WALTERS,

Solicitors for Appellees.



UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

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TION, SALMON RIVER CANAL COM-
PANY, LIMITED, A CORPORATION, COM-
MONWEALTH TRUST COMPANY OF
PITTSBURGH, TRUSTEE, AND A. C.
ROBINSON,

vs.

Appellants,

A. E. CALDWELL, W. F. MIKESELL, V.
E. MORGAN, J. E. POHLMAN, W. C.
POND, JAMES W. BEAUCHAMP,
CARL WASHBURN, AND HAROLD M.
SIMS, IN THEIR OWN BEHALF AND IN
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ATED WITH THEM,

Appellees.

*Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.*

Brief of Albert N. Edwards, St. Louis, Missouri,
Amicus Curiae

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STATEMENT.

The far-reaching effect of a decision on some of the ques-
tions involved in this action seems to the undersigned to
justify submitting, as a friend of the Court, the following

suggestions which seem equally pertinent whether one accepts the contention of appellees that the Irrigation Company sold to the settlers a definite quantity of water, or simply an undivided and proportionate interest in the canals, structures and water appropriations, as contended by the appellants. And for fear that we may weary the Court with a restatement of facts, with which the Court may be already familiar, we submit our suggestions in the briefest possible form, believing that the legal questions which are presented are sufficiently clear without argument:

POINTS.

1. The Federal Government is the source of title to lands reclaimed under the Carey Act, and Congress has in that Act set forth the conditions upon which title may be obtained and the amount of water that must be provided per acre, viz.: An amount that "shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops," (Sec. 4, Act approved August 18, 1894), and "an ample supply of water * * * to reclaim" the particular tract or tracts to which the applicant seeks to obtain title. (Act approved June 11, 1896.)

2. The Federal law is necessarily supreme as to the terms and conditions upon which the Government shall part with its title to the public domain, and the laws of the State of Idaho must be construed in harmony therewith, and that such was the intention of the state legislature, is shown by the following extracts from the statutes:

(a) "The State of Idaho hereby accepts the *conditions* of Section 4 of an Act of Congress, entitled, 'An Act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes,' approved August 18, A. D. 1894, together with all the grants of land to the State under the provisions of the aforesaid Act."

Session Laws 1895, page 215.

Session Laws 1899, page 282.

Sec. 1613, Revised Codes of Idaho.

(b) "When the works designed for the irrigation of land under the provisions of this chapter shall be so far completed as to *actually furnish an ample supply of water* in a substantial ditch or canal to reclaim any particular tract or tracts of such lands, the State of Idaho shall, through the State Board of Land Commissioners, make proof of such fact and shall apply for a patent to such lands in the manner provided in the regulations of the Department of the Interior."

Session Laws 1895, page 215, Sec. 19.

Session Laws 1899, page 282, Sec. 19.

Section 1628, Revised Codes of Idaho.

3. The public policy of the State is not inconsistent with the provisions of the Carey Act that the settler shall receive an ample supply of water and that patent shall issue only upon proof of that fact. It is provided in Section 3289 of the Revised Codes "that no person, company or corporation shall contract to deliver more water than such person, company or corporation has a title to, by reason of having complied with the laws in regard to the appropriation of the public waters of this State." And by an Act approved March 13, 1909 (Session Laws 1909, page 335), provision is made against the sale of water rights by private corporations until the sufficiency of the supply has first been approved by the State Board, and severe penalties are imposed on the officers and agents of such corporations for selling water rights except in accordance with the provisions of said Act.

4. The correct construction of the State and Federal laws relative to Carey Act projects and of the contracts involved in this case, must be that undivided and proportionate inter-

ests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal statutes. Beyond that point sales cannot be made, and all contracts entered into after that limit has been reached, must be absolutely null and void, unauthorized alike by State and Federal laws. Any other construction would lead to the disastrous situation that a settler who had purchased water rights before such limit had been reached, would without his knowledge, acquiescence or consent, be deprived of his property—of all possibility of obtaining title to his land, by the Company selling water rights in excess of the limit or to an extent that would leave each settler less than an “ample supply,” as required by the Federal law as a condition precedent to the issuance of patent.

5. The limit on the sale of water rights is therefore not only that the sale of undivided interests shall not exceed the theoretical appropriation made by the construction company (1500 second feet in the instant case), but in the event the actual supply be less than the theoretical appropriation, the sale cannot exceed the actual supply under a water duty to be approved by the Secretary of the Interior when application for patent is made under the Carey Act. Sales beyond the actual supply must be held absolutely null and void and cannot be construed to operate as a diminution or reduction of the rights that had previously been sold. Each purchaser in his order must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land, and neither the State nor the parties to the contract can be held to have intended such a result. The State in accepting the final proof of the settler requires that such proof “shall embrace evidence that he is

owner of shares in the works which entitle him to a water right for his entire tract of land *sufficient in volume for the complete irrigation and reclamation thereof.*" If this provision be observed a situation cannot arise where the State has accepted final proof and issued its final certificate to a settler who cannot obtain patent from the Federal Government because of the insufficiency of the water supply.

6. While conceding the doctrine of dedication and the sale of undivided and proportionate interests and the rule of parity between water users, as contended for by appellants, we respectfully submit that where the available supply is insufficient to entitle the State to patent for all the lands segregated, there is the further limitation on the sale of water rights that such rights cannot be sold beyond the acreage for which patent may be obtained and that all contracts entered into after such limit has been reached are absolutely null and void and such contracts cannot operate to defeat those who purchased before such limit was reached, of their title or of the opportunity to obtain patent to the lands which they may have entered.

Respectfully submitted,

ALBERT N. EDWARDS,

St. Louis, Missouri,

Amicus Curiae.

United States
Circuit Court of Appeals
For the Ninth Circuit

TWIN FALLS SALMON RIVER LAND AND
WATER COMPANY, a Corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a Cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, Trustee, and A. C.
ROBINSON, *Appellants,*

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E.
MORGAN, J. E. POHLMAN, W. C. POND,
JAMES W. BEAUCHAMP, CARL WASH-
BURN, and HAROLD M. SIMS, in their own
behalf and in behalf of all persons similarly situ-
ated with them, *Appellees.*

PETITION OF APPELLANTS FOR REHEAR-
ING OR MODIFICATION OF DECISION

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

S. H. HAYS,
RICHARDS & HAGA, and
McKEEN F. MORROW,
Solicitors for Appellants.
Residence: Boise, Idaho.

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*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

*To the Honorable The United States Circuit Court
of Appeals, for the Ninth Circuit:*

Your Petitioners, Twin Falls Salmon River Land
& Water Company, Commonwealth Trust Company
of Pittsburgh, Trustee, and A. C. Robinson, appel-

lants in the above entitled cause, respectfully petition this Honorable Court, as follows:

1. To amplify the decision herein so as to render clear beyond possibility of misconstruction the nature of the interest which this Court holds that a purchaser of water rights acquired in the irrigation system, and whether the construction company is a guarantor of the sufficiency of the water supply and is liable in damages if it fails to deliver (the supply being insufficient) the amount of water required, the purchaser having received his full proportionate share of the available supply, but the same being insufficient to produce a maximum yield. And in the event this Court meant to hold that the construction company is under an unlimited obligation to deliver what the settler requires, regardless of the insufficiency of the available supply, then your Petitioners pray that a re-hearing may be granted them in this cause, to the end that they may be permitted to more fully express their views on the subject and show why such decision is contrary to and in conflict with the decisions of the Supreme Court and statutes of the State of Idaho.

2. That the statements in the opinion to the effect that the irrigation system constructed by the appellant Twin Falls Salmon River Land & Water Company has not the required capacity, but that "the capacity of the system being, as has been said, only about one-third of what it was then thought it would be," and other statements of a similar nature, and statements to the effect "that the construction

company has already sold water rights far beyond the available supply of water," be stricken from the opinion as they are unsupported by the record, were not in issue, and are prejudicial to the rights of these appellants, and may be accepted in the future by courts and other tribunals and public officials as *res judicata* and conclusively binding on these appellants, when the record, as a matter of fact, shows that the irrigation system has a capacity far in excess of its requirements and the trial court declined to permit appellants to introduce evidence as to the sufficiency of the water supply, on the erroneous assumption that the construction company must deliver $2\frac{3}{4}$ acre feet per acre, even though the settler does not need it.

3. That the statements in the opinion to the effect that the Federal law does not require the Secretary of the Interior *to determine the sufficiency of the water supply before the segregation is made and before the works are constructed and the lands thrown open for entry*, but may defer his decision until *after* the works have been built and the lands have been settled upon and improved by actual settlers, and may in fact change his decision as to the sufficiency of the water supply *after the works have been so constructed, and the lands settled upon and occupied by actual settlers*, be either stricken from the opinion as not necessary to a decision of the case and as having no bearing upon the conclusions reached by this Court on the other questions upon which the decree of the trial court was reversed, or that a

rehearing be ordered upon this question and appellants given full opportunity to show why the decision of this Court on that question is contrary to law and will cause irreparable injury to both appellants and appellees if the same be permitted to remain in the opinion in its present form.

4. That in the event this Court concludes that the Federal law does not require the Secretary of the Interior to determine the sufficiency of the water supply before the segregation is made, but may defer his decision until after the works have been built and the lands have been settled upon and improved by settlers, then the Court should further hold that the construction company could not legally sell water rights in the system beyond the point where the undivided interest acquired by the individual settlers would entitle them to sufficient water to meet the requirements of the Secretary of the Interior when application is made for patent, and that all contracts entered into after that limit was reached are null and void and unauthorized alike by State and Federal laws; for any other construction would lead to the disastrous situation that a settler who had purchased water rights before such limit had been reached would without his knowledge, acquiescence or consent be deprived of his property—of all possibility of obtaining title to his land, by the Company selling water rights in excess of the limit or to an extent that would leave each settler less than an “ample supply,” as required by the Federal law as a condition precedent to the

issuance of patent. For if the Secretary is not required to issue patent based upon his decision at the time the segregation was made, that the water supply was sufficient, then we submit the correct construction of both the State and Federal laws on the subject must be that undivided and proportionate interests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal statutes; but sales beyond the actual supply must be held absolutely null and void and cannot be construed to operate as a diminution or reduction of the rights that had previously been sold. Each purchaser in his order, until the available supply was exhausted, must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land and the lien of the construction company, and neither the State nor the parties to the contract can be held to have intended such a result.

5. Appellants are entitled to recover their costs on appeal.

ARGUMENT

In view of the many parties and the large interests concerned in this controversy, and the time and expense required to bring about a complete determination of all questions involved between so many conflicting interests, it is of the highest importance that the decision of this Court should finally determine

all the questions that can be raised on the record, and that the decision of the Court be not subject to misconstruction, for in that event the re-trial of the case may be entirely fruitless, and this all parties clearly desire to avoid.

The various interests affected have already placed different constructions on the decision rendered in this case. Whether the decision is susceptible of more than one construction it is unnecessary to discuss. It is sufficient that parties interested and the trial court may differ as to its construction, and such differences will undoubtedly lead to further appeals and to unnecessary expenditures of time and money and to great delay in the final determination of the case.

We shall first consider what is said in the opinion with reference to the nature of the water rights acquired by the settlers, and if our construction of the decision is correct we are in entire accord with the views expressed by the Court; but if we have misconstrued the decision, then we would respectfully pray that a rehearing be granted.

I.

The Construction Company discharges its duty when it apportions between the Water Users the Available Supply at the rate of 1-100 of a cubic foot per second in periods or by rotation as the crops of the Settler may require, and it is not a guarantor of the Water Supply and is not liable in damages if the available supply is insufficient.

As we construe the decision in this case, the above statement tersely expresses the decision of the Court on this proposition, and we are in entire accord with the views of the Court, for we think the laws of the State and the contracts before the Court are not susceptible of any other construction. It appears, however, that different interpretations are being placed upon the Court's decision on this question. The Court says (p. 29) :

“It therefore appears by the express declarations of the contract between the parties that the specific amount of water sold to the respective settlers is not a constant flow of that amount, but to be delivered and received in rotation; and such, as we understand, is the almost if not quite universal custom under similar systems of irrigation works. It may be that such amount so used may prove insufficient for the proper irrigation of these lands, but it is most obvious that the interest of all the parties concerned demand the utmost care in the distribution and use of the water, to the end that the best results possible may be obtained. When the well-known fact is remembered that desert lands after cultivation can produce profitable crops with less water than when new, and that a very considerable quantity of the lands embraced within the present project have, according to the record, been abandoned, with the possibility that more may be, it is at least to be hoped that of the remainder a success may be made for all concerned.”

This statement is construed by appellees as meaning that they are entitled to receive 1-100 of a cubic foot per second throughout the entire irrigation season if their crops require this amount, and this would amount to 4.16 acre feet per acre (record, p. 19), instead of $2\frac{3}{4}$ acre feet per acre, which was allowed them by the trial court and which was really all that the appellees contended for.

We should add that appellees further construe the opinion to mean that the construction company obligated itself to deliver 4.16 acre feet per acre per annum at the rate of 1-100 of a cubic foot per second, in the event the crops require that amount, and that it is liable in damages if it fails to deliver that amount, although its failure to make delivery may be due entirely to the insufficiency of the supply. In other words, the decision is construed by some as meaning that the construction company must not only deliver to each settler his proportionate part of all that is available in the event the crops require it, but it must respond in damages if the proportionate part so delivered is insufficient for the needs of the crops and is less than 4.16 acre feet per annum. It will be observed that this construction of the opinion renders the decision of this Court far more favorable to appellees than was the decision of the trial court from which appellants appealed and from which appellees *did not appeal*.

Your Petitioners, however, as stated above, construe the statement quoted and other statements in the opinion with reference to this matter as meaning that the irrigation company must deliver the

water available to the settlers at the rate of 1-100 of a cubic foot per second at such times and in such periods of rotation as the condition of the crops may require, but that its liability in this matter ceases when all the water available has been properly distributed, even though the amount distributed is less than 4.16 acre feet per acre and less than what may be required to produce a maximum yield; and we think that is a fair construction of the Court's opinion.

Should the trial court accept the construction placed on the opinion by appellees, appellants would be compelled at great sacrifice of time and money and at the expense of long delay in the final determination of this controversy to again appeal to this Court for a determination of the question, and we therefore feel justified in petitioning the Court to amplify its statements or views on this matter before the cause is remanded to the trial court for further proceedings. But in the event we have misconstrued the Court's opinion and the court in fact intended to hold as contended by appellees, then we would respectfully ask the Court to grant a rehearing on this point so that appellants may be permitted to further present their views and additional authorities on the question.

It is respectfully submitted that the contracts before the Court deal only with the *rate of flow* and with the *capacity* of the canals, reservoirs and ditches, and that the *nature of the water right acquired is determined by the statutes of the State*, which

provide that the settlers must acquire and receive a perpetual right, "*said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with the rights and franchises attached thereto.*"

Section 1615, Idaho Rev. Codes.

We respectfully submit that neither the State contract nor the settlers' contract in any way modify, and in fact could not modify, and neither enlarge nor reduce the interest thus acquired, or the nature of the right. It was, however, entirely proper that the contracting parties should agree that the ditches to be constructed by the contractor should have a capacity sufficient to deliver the settler's water to which he was entitled under the statute "at the rate of 1-100 of a cubic foot per second per acre." This matter related solely to the construction features of the works and was an essential part of the construction contract, for it fixed the capacity of the canals without going into details as to dimension and grade. It seems to us that appellees erroneously construe the provisions of the contract, which deal only with the *rate of flow*, into a provision for the *sale of water*, and if, as stated above, the Court's opinion has been correctly construed by appellees, a rehearing should be granted these appellants for there would seem to be fundamental error in such a construction of the State laws and the contracts involved. And further, such a construction was not contended for by appellees, and being more favorable to them than the decision of the trial court the limit should in any event

have been placed at $2\frac{3}{4}$ acre feet per acre which was accepted as sufficient by appellees, and not 4.16 acre feet. For under this construction of the opinion it must follow that the error in the trial court's decision was simply in holding that the settlers were entitled to receive $2\frac{3}{4}$ acre feet per acre to be delivered at the rate of 1-100 of a cubic foot per second, *whether their crops needed the water or not*; whereas this Court, under appellees' construction of the opinion, gives the settlers 4.16 acre feet per acre at the rate of 1-100 of a cubic foot per second, *provided their crops require this amount*, and this would seem to express the difference between the two opinions on the nature of the water right; that is to say, under this construction, this Court has simply increased the amount (to be delivered to the settlers) from $2\frac{3}{4}$ acre feet per acre to 4.16 acre feet, although no appeal was taken by the settlers from the trial Court's decree. Clearly, the decision cannot be given a construction that will lead to such obviously incorrect results.

The laws of the State of Idaho as construed by its highest court conclusively determine the nature of the interest which a settler acquires in the irrigation system and water rights of a Carey Act project, namely, he must purchase a *perpetual water right* for each acre of land susceptible of reclamation from the system, "said *perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.*"

Sections 1615, 1626, and 1627, Idaho Revised Codes.

The "perpetual water right" and "water rights" referred to in the statute are not *independent* of the "proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto," but the water right referred to is embraced in and is a part of what is acquired by the settler by virtue of his ownership or purchase of such proportionate interest. In other words, the settler does not buy two independent rights and interests, but he buys a proportionate interest in the system which under the law gives him a perpetual water right or an undivided and proportionate interest in the water rights belonging to the system as well as in the canals and other structures.

These statutes and these questions have been so frequently before the Supreme Court of the State of Idaho that their meaning is no longer subject to controversy. In *State vs. Twin Falls Canal Company*, 21 Ida. 410, the court, after quoting Section 1615 of the Revised Codes relative to the interest which a purchaser shall acquire in the system, and after referring to the expression "said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto," said:

"The term 'rights and franchises' as used in that section means *water rights* as well as other rights, including dams, canals, ditches, laterals, etc., and the interest which the purchaser of a *water right* has, not only in the irrigation works, but in the *water rights* as defined by that section

of the statute, is a proportionate interest. *Thus said statute contemplates that each owner of a water right has a proportionate interest in said entire irrigation works.*" (Our italics.)

After referring to the sections of the statute relating to the construction of Carey Act projects, the court says:

"Under the provisions of the statute, the completing of said works is supervised by the State and ultimately the works must be turned over to the settlers, thereby providing a kind of municipal ownership.

"Under the rules and regulations of the Land Board adopted October 16, 1909, the relation of the builder of the works to the project is set forth as follows: 'The company entering into this contract with the State is related to the undertaking simply as a construction company, whose duty it will be under the provisions of the State law and the terms of the contract to build a canal under the supervision of the State, the money spent in such construction being secured by the land which the canal is designed to irrigate.'

Again the court says (p. 439, Idaho Report):

"Under the contract the interest of the settler is a proportionate interest in the entire canal system and water appropriation. . . . *The contract required the canal to have in all of its parts a capacity of 1-80 of a second foot per acre,*"

instead of 1-100 as in the case at bar.

And again, on page 444:

“And further, under said contract, the settler owns a *proportionate share of said canal system and the water appropriated for the irrigation of the land within said project.*”

This decision leaves no room for doubt that the water right sold the settler is a proportionate interest in the water rights of the Company and in the canals and irrigation works constructed under the State contract. This decision was reaffirmed in a case bearing the same title reported in 27 Idaho 728, and it has been repeatedly approved in other cases where the question has incidentally been before the court.

In *Bennett v. Twin Falls North Side Land & Water Co.*, 27 Ida. 653, the relation of the construction company to the system and the water rights and the settlers was again before the court, and it was there said:

“Said Land and Water Company is simply a Carey Act construction company, formed only for the purpose of acquiring a right to the use of water *which it temporarily holds, in a certain sense, as trustee for the prospective entryman* and which water right the entryman perfects by the application of the water to the reclamation of such lands. The Land and Water Company at no time has a perfected water right in the sense that it has applied the water to the reclamation of the land. In fact, it would be impossible for

it to perfect a water right, as it holds no land upon which the water could be used, and it only complies with the legal forms in the initiation of the water rights for and on behalf of the prospective settlers, while the settler, by an application of the water to a beneficial use, perfects the water rights and keeps and maintains the same alive, or prevents, by the use of the water, such right from lapsing.

“The Land and Water Company as a construction company *acquires, builds, or constructs nothing for itself*, but does so for the canal and operating company or settler, *and the entrymen own, operate and control the water rights and canal system* through the medium of the canal company, in which they all become share or stock holders by making the payments for their water rights.” (Our italics.)

In *Idaho Irrigation Co. v. Lincoln County*, 28 Ida. 98, the question was again before the court in a case involving the question as to whether the interest of the construction company was subject to taxation under the laws of the State, and the court in that case discusses fully the nature of the rights acquired by the settler and the relation of the construction company to the system. It was there said:

“It is clear from the provisions of said Carey Act and the amendments thereto, and the statutes of the State applicable to said Act, that companies like the defendant are treated by the State

as, and are in effect nothing but construction companies engaged in constructing irrigation works under a contract with the State, and their remuneration is limited by the provisions of the Carey Act and the provisions of Section 1629, Revised Codes, to the actual cost of construction and the necessary expense of reclamation and reasonable interest thereon. . . .

“It is apparent that the law does not intend that benefit shall accrue to the construction company, and it is clear that the construction company is not the owner of the works constructed by it, nor of the water right connected therewith, for under the provisions of said Section 1629, the construction company is given a first and prior lien on the water right and land upon which said water is used for all deferred payments for such water right, *and under no reasonable construction of such law can it be held that the construction company is the owner of either the water right or the system, but is only given the right to sell them for the purpose of reimbursing it for the cost of construction.*

“The only means of remunerating the construction company is by the sale of the water rights. The State Land Board fixes the price per acre to be charged for such water rights by dividing the cost of reclaiming the land by the number of acres to be reclaimed and when all of the water rights connected with such system have been disposed of the construction company has, at least in

theory, been reimbursed by its outlay; provided that purchasers of such water rights pay the purchase price for them. The water rights unsold can not be considered in the ordinary sense as assets of the construction company, since water rights remaining unsold represent rather a liability of the construction company which can only be met by the sale of the water rights as provided by law.

“ . . . The construction company's interest *in the reservoir, dams, water rights, etc., is represented by the lien provided by law to cover the cost of construction.* Said Section 1629 authorizes the State to create a lien to cover the cost of construction with interest, and this lien represents the amount of money which the company has expended on which it has not received any return from those purchasing water rights.

“We refer to these matters for the purpose of showing the history and intent of the statutes above referred to.” (Our italics.)

The last expression of the Idaho Supreme Court on the subject is in the recent case of State of Idaho and Robert Rayl vs. Twin Falls Salmon River Land & Water Company, decided December 27, 1916, not yet reported because a rehearing was asked on certain points; but on the subjects herein referred to the decision was seemingly accepted as correct by all parties. The rehearing was requested by the State because the court held that the State and its grantees were not entitled to purchase water rights

in the system. That decision is the most exhaustive discussion of the subject found in any of the reported cases. The court reviews the statutes, both State and Federal, and the history and intention thereof. The identical contracts now before this Court were before the court in that case. The court holds squarely that the construction company is not the owner of either the water rights or the irrigation works, but serves simply as a conduit for transferring the title from the State to the settlers. The court said:

“The construction company was permitted, under the law, to appropriate the water, but only for the purpose of transferring it to the settlers for their use and benefit in connection with the irrigation system constructed by it. . . . A construction company desiring to build such works may make a proposal to do so for the irrigation of certain definite tracts of land, according to certain definite plans. (Sec. 1615, Rev. Codes.) This proposal really amounts to a bid for the doing of the work or the construction of the irrigation system. Section 1617, Revised Codes, provides that at the time of making such proposal, the construction company ‘shall have filed with the State Engineer an application for a permit to appropriate water for the reclamation of the lands described’ in the proposal. This seems to have been deemed a convenient way of attaching the water supply to such project.

“The entire plan seems to be one of complete State supervision and control.

"The interest which the settler has in the enterprise is defined by Section ~~4516~~⁴⁶⁴³, Revised Codes, it being thereby required that the proposal shall state 'the price and terms per acre to which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises (water rights) attached thereto.' This 'proportionate interest' was intended to be in the right represented by the water permit taken out for the project. It was intended that the settler should ultimately own the entire project—the works and the water rights.

". . . The company building the works is a construction company only. It constructs the works and payment to it must be made from the lien fixed by law, upon the land.

"As stated before the construction company was not the owner of the water. Under the law it was permitted to make an appropriation of the water for a specific purpose and before such appropriation was completed, it must construct works amply sufficient to carry such water for irrigation to the place of intended use as provided by the contract with the State." (Our italics.)

It would seem from these decisions that there is no authority for holding that the construction company guarantees a water supply or sells a specific amount of water; but the construction contract very properly and necessarily provides for the *size* of the

system to be constructed, and that is given in terms of carrying capacity, namely, it must be large enough to carry 1-100 of a cubic foot per second for each acre of land entitled to water therefrom, and that fixes *the rate of flow* or irrigation head which the settler is entitled to receive. Manifestly the contract would be incomplete if the dimensions or carrying capacity of the system were not set forth therein. But the rate of flow or irrigation head must not be confused with the *water right itself*, which is an independent matter and is determined by the statutes of the State and consists of a proportionate interest in the canals and other structures and all the rights and franchises attached thereto, which the Idaho Supreme Court says includes the water appropriation of the construction company made for that particular project.

We submit therefore that there is no basis for the contention that the company has sold the settlers a *water right* independent of the *proportionate interest* which the statutes provides the purchaser shall receive, or that the company has entered into an *unlimited* and *unconditional guarantee* whereby it guarantees delivery of a specific amount of water for all time.

II.

The Court should strike from the Opinion certain Statements prejudicial to appellants and not based upon facts in the record.

The opinion contains a number of statements which were apparently taken from the brief of ap-

pellees, which are wholly unsustained by the record, in fact some of them flatly contradicted by the record, and which are prejudicial to appellants and might in the future be construed as *res judicata*. Near the top of page 27 of the opinion the Court, after referring to the acreage which it was originally intended to reclaim from this system and from the water appropriated therefor, and to the errors made in the estimates, says:

“How great all of them erred in their estimate is shown by the record in the case—*the capacity of the system being, as has been said, only about one-third of what it was then thought it would be.*” (Our italics.)

It would seem that the Court must have used the term *capacity* in the above statement as having reference solely to the amount of water available, and as not referring to the carrying capacity of the canals or the storage capacity of the reservoir; for clearly there is no contention that the system has not been well constructed and of the requisite size and dimensions to deliver water at the rate of flow stipulated in the contracts; and there is no question but that the reservoir has been built of the size and dimensions provided in the plans and specifications. In fact the canals have substantially double the capacity contemplated by the State contract. In other words, the canals have a carrying capacity sufficient to deliver water to the settlers at a rate considerably in excess of 1-100 of a cubic foot per second per acre (record, pp. 191-192, 234). But if we assume that

the word *capacity*, as used in the above statement, has reference to the amount of water available for distribution, the expression is still unfair to appellants, especially when read in connection with other statements in the opinion on the subject, particularly what is said on page 25, viz.:

“And in view of the fact, *shown by the record and which is here undisputed, that the construction company has already sold water rights far beyond the available supply of water*, we are also of opinion that the court below was entirely right in enjoining it from making any further sales.”
(Our italics.)

This statement is especially prejudicial to appellants and unsupported by the record, for the trial court declined to try the issue as to the duty of water or the sufficiency of the available supply to serve the need of the settlers on the theory that the water contract required the company to deliver $2\frac{3}{4}$ acre feet per acre, regardless of whether the settler needed the water or not. In so holding the trial court was clearly wrong and it was so held by this Court in this opinion. Appellants produced a number of experts on the duty of water, thoroughly competent and qualified to testify intelligently on the subject, but the court declined to hear that evidence, all of which was error, as held by this Court in its opinion. But the above statements in the opinion, particularly “that the construction company has already sold water rights far beyond the available supply of water” will be especially prejudicial to appellants in all fu-

ture proceedings, not only in this case, but in adjustments before other tribunals especially when application is made for patent; for if the Secretary has any right to again pass upon the sufficiency of the water supply he will unquestionably give great weight to the opinion of this Court that water rights have been sold "far beyond the available supply of water."

And in view of the fact that appellants have contended in good faith that the water supply was sufficient to properly reclaim the lands entitled to water from the system, and the trial court has declined to hear evidence on the point, on the erroneous theory that it was not an issue, we respectfully submit that facts of this importance which have not been proven should not be assumed as established, particularly when they will have the prejudicial effect that it is apparent they will have in this case.

Appellants have expressed their entire willingness to discontinue the sale of water rights; in fact they voluntarily discontinued such sales several years ago, and they have no objection to the injunction continuing enjoining them from selling additional rights, if such restraint should be deemed necessary. But the injunction should not rest upon the ground that they have oversold the available supply, for that fact has not been established. It should be sufficient that appellants admit that they have sold to the limit of the available supply, and that they do not desire to make further sales. We submit, therefore, that the statements referred to should be stricken from

the opinion, or else they should be qualified in a supplemental opinion so that they will not operate to appellants' prejudice in future proceedings.

III.

Does the Federal Law contemplate that the Secretary of the Interior shall determine the sufficiency of the Water Supply before the segregation is made and before the works are constructed, or should such decision be deferred until after the works have been built and the lands have been settled upon and improved by actual settlers?

The Court in its opinion says:

“It is obvious that whether or not such a supply (sufficient to justify the issuance of patent under the Carey Act) is actually furnished is a pure question of fact; and that all questions of fact in relation to all public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other Federal courts as to render the citation of cases unnecessary. To what extent the Secretary of the Interior will, in determining the facts, take into consideration the approval of the plan by himself as well as by the State officials, and his order segregating the tract applied for from the public domain will be for him to consider and determine.”

The legal propositions referred to in the above quotation were not discussed at the oral argument and, we believe, were not referred to in the briefs

filed at the time or before the hearing, and in any event were not referred to in the decision of the court below. And apparently the reversal of the trial court rests in no way on what this Court said on this subject.

What this Court, however, said in the above quotation and in what immediately preceded it about this matter will undoubtedly influence the trial court in the relief that may be granted. The question is of vast importance to the parties in the practical solution of the controversy, but the statements of this Court with reference to the matter show clearly that the Court seemingly missed the point which appellants have made with reference to the binding effect of the Secretary's decision, and we think the Court erroneously assumed that it was *a question of fact* when we believe it is largely, if not entirely, *a question of law*.

In the first place, appellants have never contended that the Secretary did not have the right to pass upon the sufficiency of the water supply. On the contrary, appellants contend, and always have contended, that it was the duty of the Secretary to determine the matter, and that the Secretary had as much right to determine that question as he has to determine the classification of lands as mineral and non-mineral or as desert and non-desert; but appellants submit that the law contemplates that when the Secretary has *once* determined the question and rights have vested in reliance upon that determination he cannot change his views, ignore his former

decision, and decide that the water supply is insufficient when he had formerly declared it to be sufficient. We believe the law clearly contemplated that the sufficiency of the water supply should be determined *before* and not after the construction of the works is undertaken, *before* and not after the land is segregated, *before* and not after the State is permitted to contract with settlers to deliver the title, and *before* settlers are permitted to go upon the lands, establish homes there and make substantial and valuable improvements.

It is inconceivable that Congress intended that all of these things should be done and then, as the last and final step in the obtaining of title, the Secretary should determine whether there was sufficient water available in the source of supply for the reclamation of the lands to justify the issuance of patents, the giving of title to the settlers or the attaching of the lien for the security of capital building the works.

The determination of the sufficiency of the water supply to accomplish the reclamation required by the Federal Act is not entirely a question of fact. It necessarily involves a construction of the law as to the extent of the reclamation required. The assembling of the data and facts as to the water supply is, of course, a matter which involves only facts, but the extent of reclamation required by the Federal Act before the Secretary is justified in issuing patent is clearly a question of law. It raises questions which from no viewpoint can be said to be questions of fact. For instance, (1) Does the Federal Act re-

quire that the entryman shall have sufficient water to produce a maximum yield of a crop requiring a very large amount of water, such as alfalfa? Or, (2) Is the law satisfied if the entryman has sufficient water to raise a profitable grain crop requiring but a small amount of water, such as oats, barley, or wheat? Or, (3) Does the law require that the entryman shall have sufficient water to produce a maximum yield of any kind of grass or grain crop that it may be possible to grow in that section? Or, (4) Is it satisfied with sufficient water to raise a profitable crop under good farming conditions, though less than maximum yield? Or, (5) To what extent does the law consider the economic duty of water?

We think the above propositions are questions of law upon which the Secretary must undoubtedly pass, either when the segregation is made or when application is made for patent; and there is a very wide difference between the acreage that may be reclaimed from the available supply under the several constructions that may be placed upon the law. If the law be satisfied with a grain crop, such as oats, barley or wheat, $1\frac{1}{4}$ acre feet of water per acre would undoubtedly be sufficient. On the other hand if the law contemplates that the entryman shall have sufficient water to produce a maximum yield of a crop requiring a large amount of water, such as alfalfa, then 3 or 4 acre feet would probably be required, and the area reclaimable would be only about one-third what it would be under the other possible construction.

We submit that the case cannot be disposed of upon the general proposition that it is simply a question of fact, the exclusive determination of which has been vested in the Land Department. *But we are not questioning the right of the Secretary of the Interior to pass upon the matter.* We are simply insisting that having passed upon the matter when the segregation is made, *he cannot change his determination after the State has contracted with the settlers to deliver title, and after the construction company has constructed the work in reliance upon the lien authorized by the Federal Act, and after the settlers have made improvements and established homes on the land.*

The Federal Act was the forerunner of the National Reclamation Act under which the works are constructed by the Federal Government. The original Carey Act contemplated that the works would be built by the State. This was found impracticable, and hence the amendment of June 11, 1896, which authorized the State to create a lien against the lands segregated in favor of the construction company. It is clear from the discussion in the House that the amendment was proposed for the purpose of furnishing adequate security to induce private capital to undertake the construction of irrigation works. The time had not then arrived for the Federal Reclamation Act, and the purpose of the amendment was to induce private capital to do what individual effort could not accomplish under the Desert Land Law and what the States could not do under the original

Carey Act. That *security* for the large amount of capital required for the building of irrigation works was the essential object of the Act, as amended, was clearly apparent.

Congressman Mondell, of Wyoming, in discussing the amendment of 1896, said (Congressional Record, June 6, 1896, p. 6224) :

“There remain vast tracts of bench lands back some distance from the largest streams, requiring the expenditure of vast amounts of capital for their irrigation. It is absolutely necessary that, in inviting capital to the irrigation of vast tracts, we shall make such provision as shall absolutely insure to capital a fair return of the investment made. We simply provide in this amendment that the State shall pass such laws as will adequately protect both the capitalist and the small holder of land * * *.

“It is but reasonable when capitalists undertake to irrigate vast areas of desert land, which, without irrigation, will absolutely not sustain animal or vegetable life, that they should expect to be reasonably protected in the investment they make. It is only by providing for this protection that we can ever hope to have our country developed * * *.”

The amendment of June 11th makes two important changes in the original Act. First, it authorizes the State to create a lien against the public lands “for the actual cost of necessary expenses of reclamation and reasonable interest thereon.” Second, it

provides that patent shall issue without regard to settlement or cultivation, "when an ample supply of water is actually furnished in a substantial ditch or canal or by artesian wells or reservoirs."

Under the law the segregation cannot be made until the Secretary has determined that there is *sufficient water available to reclaim the acreage segregated*, and that the plan submitted for the reclamation of such land is feasible. These questions must be determined by the Secretary before he is authorized by the law to segregate the lands from the Public Domain and tie them up in a contract with the State for a period of ten years.

It is true that the contract of segregation contains reservations inserted by the Secretary, for which there would seem to be no authority in the Act, and under these reservations the Secretary attempts to reserve authority in himself to do when application for patent is made, what the law requires him to do before the lands are segregated from the Public Domain, viz., determine the sufficiency of the water supply to properly reclaim said lands. If the reservations of the contract of segregation are valid and authorized by the Act, then it would seem the contract is without force or effect, for the obligations assumed by the Government in one part of the contract are all apparently subject to the future decision of a future Secretary on the sufficiency of the water supply.

The contract would seem to fall under the rule where the exceptions are as broad as the grant, and

the purported contract is in fact not a contract, for the agreement to patent the lands is conditioned as to every essential point on the views of the Secretary that may be in office when patent is demanded. Manifestly if the reservations are valid, the act of segregation does not furnish the slightest security for the capital invested, the settlers, or the State. For if the Secretary has the absolute power to decline to issue patent, notwithstanding the irrigation system has been constructed in full compliance with the plans which he approved when the segregation was made, then there can be no lien for the investor, no title for the settler, and the State has only brought upon itself entanglements from which it cannot escape, for it has allowed entries to be made upon the segregated lands and it has accepted the final proof of the settlers and obligated itself to furnish the settlers title, and this it cannot do because the Secretary has changed his views as to the feasibility of the project, or, possibly, because the new Secretary does not concur in the views of his predecessor.

We submit that such a situation was never contemplated by Congress, for the sanity of such legislation may well be questioned. The whole spirit and purpose of the Act was *security and assurance* rather than *confusion and uncertainty*. The law cannot accomplish its true purpose unless it be construed to mean that the Secretary must determine, as must the capitalist, the settler, and the State, the feasibility of the plan *before* it is undertaken and not *after* it has been completed. Under our construction of

the law, the Secretary must, *before* he approves the application for segregation and *before* he approves the maps and plans of irrigation and enters into the contract with the State, determine the following questions:

(a) Is the project feasible?

(b) Are the lands the kind of lands that may be segregated under the Carey Act?

(c) Is the water supply sufficient?

Clearly the feasibility of the project depends on whether there is water available for irrigation, and the lands cannot be legally segregated until he has determined that question. The law contemplates that the Secretary's decision on those points shall be final and conclusive, and there remains then but one question to be determined when application is made for patent, and that is, whether the works have been constructed in substantial accordance with the plans previously approved? That matter from the necessities of the situation cannot be determined when the segregation is made, but the other questions can as well be determined when application is made for segregation as when application is made for patent. It certainly is no more difficult for the Secretary of the Interior to determine the sufficiency of the water supply than it is for the State, the investor, or the settler, and the entire framework of Carey Act reclamation rests upon the integrity of the Federal lien, which loses all its value under a construction that reserves to the Secretary the right to ignore the determination which he made when the segregation

was made and to pass upon the question as to whether the water supply is sufficient for patent after the works have been built and the investment has been made.

Manifestly if the Secretary may reserve his decision on the feasibility of the project until after it has been completed, both the investor, the settler and the State must proceed in the absence of any certainty or security, for in that event the investment must be made first and the matter of security for the investment is the last thing to be ascertained. Clearly Congress could not have intended a procedure so obviously inconsistent with ordinary business prudence and with the recognized procedure in irrigation development.

The original Act provided for a tentative reservation of the land while the Secretary was determining the feasibility of the project and the sufficiency of the water supply, and the fact that provision was made for such temporary segregation shows clearly an intention to make the final approval of the plan of irrigation submitted by the State something more than a mere tentative or temporary act, and the amendment of 1896 shows clearly that Congress intended that the State could place some confidence in the act of segregation or the approval of the plan by the Secretary of the Interior, for it is provided:

"That any state contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation . . ."

It is incredible that Congress could have intended that the State should enter into such contracts and obligate itself to deliver title and to create liens and furnish security for the investor upon a mere tentative and inconclusive decision of the Secretary that he would patent the lands to the State, with the reservation and right remaining in the Secretary to change his mind for any cause by him deemed sufficient. If that is the proper construction of the Act, then the only security which the law furnishes to either the State, the investor, or the settler, is the stability of the Secretary's judgment on the sufficiency of the water supply. If he changes his mind the security is gone and the State can not obtain patent or the settler title, and the investor obtains no lien or security for his investment.

We submit that such a construction is so inherently unsound that it should not be adopted unless the language employed forbids any other construction.

The Secretary, however, has always proceeded upon the theory that the segregation could not be made unless the plan was feasible and the water supply sufficient. In the first regulations under the Carey Act, approved by the Secretary November 22, 1894, the Secretary provides that:

"In accordance with the requirements of the Act, the State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary.

The other data required cannot be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the lands selected must be submitted." (20 L. D. 440.)

The regulations show clearly that the Secretary did not intend to make the segregation and that the law did not, in his opinion, authorize the segregation until he had approved the sufficiency of the plan of irrigation and the sufficiency of the water supply.

In the later regulations (37 L. D. 629), the Secretary requires that in order to enable him to pass upon the sufficiency of the proposed plan, the State must furnish "a statement by the State Engineer of the amount of water available for the plan of irrigation," and it is a well-known fact that the Department of the Interior, through its own special agents, investigates and reports on the character of the land and the feasibility of the plan of irrigation before any segregation is made. (See Instructions to Inspectors and Special Agents, dated March 9, 1909, 37 L. D. 489.) In those instructions the Commissioner and the Secretary join in the statement that "*The time to ascertain whether the lands are of the character subject to segregation under the Carey Act, and whether there is water available for their reclamation, is prior to segregation.*"

In view of the provisions of the Act requiring a decision on the feasibility of the project before the segregation is made and in view of the information

furnished the Secretary and what is gathered by him through his own agents on these matters, what reason or authority is there for reserving a decision on all questions until application is made for patent? When the segregation is made, the State is by the Federal Act authorized to contract for the construction of the works and for their settlement and improvement; and when the State has performed its part of the contract, it is entitled to performance by the Government, for the construction of the works previously approved by the Secretary clearly earns the right to the lands segregated. In that respect the construction of the irrigation works is substantially parallel with the construction of a railroad under the railroad land grants. Referring to such grants, the Supreme Court of the United States, in *Burke vs. Southern Pacific R. R. Co.*, 234 U. S. 669, 680, said:

“And when by constructing the road and putting it in operation, the company performed its part of the contract it became entitled to performance by the Government. In other words, it earned the right to the lands described.”

That the officers of the Land Department have no authority to defer their decision beyond the point in time contemplated by the law under which they are acting, or to make reservations to that effect in contracts or patents, has been repeatedly held by the Supreme Court of the United States in connection with the classification and patenting of lands under the railroad land grant acts. In those cases, the

Government usually granted a certain number of sections of land on either side of the road, "excepting mineral lands." Under those acts, the matter did not come before the Land Department for a decision until the road had been constructed and application was made for patent, but provision was made for the selection of lieu lands whenever a part of the grant was lost to the railroad company because of the mineral character of the land. In those cases the Land Department, although it made an investigation before patent was issued, adopted a rule, as a matter of precaution, of issuing patent to certain described lands, with the reservation, "excluding and excepting all mineral lands should any such be found in the tracts aforesaid." These reservations have uniformly been condemned by the Courts and the exception held void and unauthorized.

The Supreme Court of the United States, in *Burke vs. Southern Pac. R. R. Co.*, *supra* (234 U. S. 668, 58 L. Ed. 1527, 1552), quoted with approval from the opinion of Circuit Judge Sawyer in *Cowell vs. Lammers*, 21 Fed. 200, as follows:

"There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

If such language is too general for a patent, is it not equally fatal in a contract for a patent?

In the Burke case the Court, quoting from the decision in Deffeback vs. Hawke, 115 U. S. 392, 29 L. Ed. 424, further says:

“The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with the recitals showing a compliance with the law and the conditions which it prescribed.”

And quoting from the decision in Davis vs. Wiebold, 139 U. S. 507, 35 L. Ed. 238, the Court said:

“But we do not attach any importance to the exception (referring to the exception of mineral lands in a townsite patent), for the officers of the land department, being merely agents of the Government, have no authority to insert in a patent any other terms than those of conveyance, with the recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion they could limit or enlarge their effect without warrant of law.”

And referring to the contention that the patents may have been issued without proper investigation by the Land Department as to the mineral character of the land, the Court quoted with approval from Barden vs. N. P. R. R. Co., 154 U. S. 228, 38 L. Ed. 992, as follows:

“It is true that the patent has been issued in many instances without the investigation and

consideration which the public interest requires; but if that has been done without fraud, though inadvisably by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequences must be borne by the government until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them."

In the Burke case the Court also quoted with approval from *Shaw vs. Kellogg*, 170 U. S. 312, 42 L. Ed. 1050. In that case no patent had issued, but to avoid title passing, through the issuance of patent, to the mineral lands in a Mexican land grant, the Commissioner prevailed upon the surveyor General to conditionally approve the field notes and survey of the grant under consideration by placing in the certificate of approval of the survey, instead of in the patent, the mineral exception contained in the Act. The Court said:

"What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat, that it was subject to the conditions and provisions of the Act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. *Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute, the will of Congress.* It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. *It is an agent,*

and not principal. . . . Undoubtedly it could refuse to approve the location on the ground that the land was mineral. *It was its duty to decide the question—a duty which it could not avoid or evade.* It could not say to the locator that it approved the location provided no mineral should ever hereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of mineral. It was a question for its action, and its action at the time. . . . It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether.” (Our italics.)

The Court, referring to the question before it in the Burke case, said:

“Lastly, it is urged that the railroad company accepted the patent with the mineral exception therein, and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in nowise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement

upon the subject. They are not principals, but agents of the law, and must heed only its will.”
(Citing cases.)

The Supreme Court of Oregon in *State vs. Des Chutes Land Co.*, 129 Pac. 764, had before it provisions of the contract between the State of Oregon and a Carey Act company wherein the company had agreed with the State that no settlers' contracts would be entered into until after the works had been constructed and notice had been given by the State that water was available. In that case the company disregarded such provision of the State contract and entered into contracts in direct violation of the terms of the State contract, and the State sought to enjoin the Company from entering into settlers' contracts in advance of the time fixed by the State contract. The Court said:

“The question is whether the State Land Board had authority to insert the provision quoted in the contract with the defendant. By its legislation the State created the State Land Board as its agent to transact the business provided for in the act. There is no apparent authority, so-called, in a public officer whose duties are prescribed by statute like there would be in the case of an agent for a private party. The representative of the State must have actual authority in such cases. The agent of the State, acting under a public law, must find sanction for his doings in the statute itself; and parties dealing with such agent are bound, at their peril, to take no-

tice of the enactment conferring the agent's authority. A contract made by a public officer in excess of the provisions of the statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law under which it was attempted to be negotiated. . . . Being a departure from the Board's authority, and thus contrary to the statute, the provision is void and does not bind either party to the instrument, because the contract, to be efficacious, must be equally binding upon both parties. The defendant had a right to contract to do in the future that which might legally be done under the provisions of that section (referring to the statute). While it would be within the scope of legislative authority to prevent actual settlers from going upon the land and stipulating with the corporation for the extinguishment of its lien, so that the settler could proceed unhampered in the establishment of his home, yet this species of paternalism was not vested in the State Land Board."

That the approval of the plan of irrigation by the Secretary of the Interior was binding upon him when it came to the issuance of patent, was clearly the basis of the decision of the Secretary in the case of State of Oregon, 36 L. D. 509. In that case the Inspector of the Department reported long after the segregation had been made that the plan of irrigation was not feasible and that certain other matters should be considered by the Secretary in connection

with that segregation or the revocation thereof. The Secretary there said:

“As to the sufficiency of the scheme of irrigation of the desert portion of the land heretofore segregated, the Department has once passed upon that feature of the case and gave its sanction to the proposed plan. It may or may not be feasible in the light of existing conditions. Inspector Neuhausen thinks not, although Engineer Whistler thinks that a proposed storage reservoir will aid—a reservoir feasible but very expensive. However, that is a matter of interest to the State. The government has already passed upon its scheme; it remains for the State within the time fixed by the statutes, to carry its scheme into effective operation. If it does not, then will be the time for the Federal Government to act. The Department feels that the State should not now be harassed by bringing into controversy the practicability of its scheme.”

In justice to the Secretary, the foregoing must be construed to mean that if the State constructed the works in accordance with the plan approved when the segregation was made, patent would issue as a matter of course, without regard to the uncertainty thrown upon the sufficiency of such plan by the report of the Inspector. Any other construction would imply an unfair and unworthy motive on the part of the Secretary, and such construction would be unjustifiable under the circumstances.

We submit, therefore, that a fair analysis of the Act, in the light of the purposes which it was intended to accomplish, leads inevitably to the conclusion that patent must issue from the Federal Government to the State of Idaho in trust for the settlers and the construction company, to the lands that lie under and are susceptible of reclamation from the works constructed by the Twin Falls Salmon River Land and Water Company, upon proof that such works have been constructed in substantial compliance with the plans approved by the Secretary when the segregation was made.

Again we say that we do not challenge the right of the Secretary to pass upon the sufficiency of the water supply to reclaim the land segregated, but, on the contrary, we submit that it was his duty to determine the matter and, further, the rule is well established that, where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts.

United States vs. California and Oregon Land
Company, 148 U. S. 31, 43, 37 L. Ed. 354,
360.

But we insist that the time for determining the sufficiency of the water supply and the feasibility of the project was *before* the segregation was made and that the Secretary can not change his decision with

reference to that matter *after the works have been built and rights acquired in reliance upon his former decision*. This same rule has been applied by the Supreme Court of Idaho to the decisions of the State Board of Land Commissioners and the State Engineer in these matters.

We have already quoted at some length from the recent decision of the Idaho Supreme Court in *State of Idaho and Robert Rayl vs. Twin Falls Salmon River Land and Water Company*. The court said in that case with reference to this matter:

“The State acts in the matter of making the contract and in the approval of the form of settlers’ contracts, as well as in other matters, as agent and trustee for the settlers who in the future are to inhabit the land in the project.

“Thus it will be seen, that before making any contract, the plan for the irrigation works or system must be approved by both the State and the National authorities and the sufficiency of the water supply determined by each. Clearly, the future plan is one providing that the cost of the reclamation of such lands shall be assessed as a benefit against the land to be paid by the settler and that the benefit is assessed through the medium of the State Board of Land Commissioners.

“Of course, the engineers of the construction company examined the resources of water supply and no doubt, satisfied themselves that there would be sufficient water to reclaim the land ask-

ed to be segregated; but the determination of the question of the water supply was up to the State and the Secretary of the Interior. In the first instance, if upon such an application the Secretary of the Interior concludes that the water supply is not sufficient, he refuses the application for segregation; and if the State concludes that the water supply is not sufficient, the application is denied. But if the State has decided that question in favor of an ample supply of water, and the Secretary of the Interior has also decided that an ample supply of water exists, that question is settled, so far as the Government and the State are concerned.

“That question was evidently understood to have been fully settled by proper authority before the construction company would undertake the expenditure of from two to three million dollars in constructing an irrigation system. Is it possible that any good business man or corporation would consent to the expenditure of from two to three million dollars in the construction of an irrigation system, leaving the question open for the State and Government to decide thereafter whether there was a sufficient water supply for the project? It seems to us not. . . .

“It is clear, under the provisions of the Carey Act and the State law applicable thereto, that the proper officers there referred to must determine in advance the sufficiency of the water supply, the character and kind of system of irrigation that must be constructed and the price

to be charged the settlers for an interest therein. This matter is not left to the judgment of the construction company. The whole matter must be first approved by the State and then by the Federal Government. These things are all done before the execution of the contract between the State and the construction company. . . . We think the law is well settled that where officers, such as the State Engineer, the State Land Board, and the Secretary of the Interior are authorized by law to pass upon matters of this character, their decision is conclusive."

Clearly no one should be made to suffer because he has in good faith placed confidence in the official acts of public officials, and in view of the importance of this question we respectfully submit that a rehearing be granted so that it may be fully discussed.

IV.

If the Secretary of the Interior is not bound by his first decision as to the sufficiency of the water supply and feasibility of the Project, but may finally determine the duty of water on the Project when application is made for patent, then it must necessarily follow that all water contracts entered into after the limit fixed by the Secretary was reached are absolutely void, and the available supply must be distributed between those who purchased before such limit was reached.

While we are firmly of the opinion that patent should in this case issue to all the settlers and that

the Secretary should not be permitted to repudiate his approval of the water supply and his decision that it was sufficient, made when the segregation was applied for, nevertheless, if the Court holds to the contrary, we submit that it must necessarily follow that the doctrine contended for by Judge Albert N. Edwards of St. Louis, who filed a brief in the case as *amicus curiae*, should be adopted, viz.:

That undivided and proportionate interests in the irrigation system and water rights may be sold to the limit of the available supply, or to a point where such undivided interest will entitle the owner to a water supply sufficient to obtain title to his land under the Federal Act. But beyond that point sales cannot be made, and that all contracts entered into after that point has been reached are absolutely null and void, unauthorized alike by the State and Federal laws. Any other construction would lead to the disastrous situation that a settler who had purchased water rights before the limit was reached, would without his knowledge, acquiescence, or consent, be deprived of his property,—of all possibility of obtaining title to his land,—by the company selling water rights in excess of the limit or to an extent that would leave each settler less water than the Secretary of the Interior may require as a condition precedent to the issuance of patent. Each purchaser, before the available supply has been exhausted, must be held to have purchased and acquired a supply sufficient to entitle him to patent. Less than that would defeat his title to the land, and neither

the State nor the parties to the contract can be held to have intended such a result, or a plan or procedure that would give no title to the settlers and no lien to the construction company, but would result in a total destruction of the investments of all parties and a forfeiture of the lands to the Federal Government, notwithstanding the works and the water rights would be ample to irrigate a very large part of the entire segregation, or all the lands entitled to water under contracts entered into upon the faith that the Secretary would adhere to his first decision.

This doctrine concedes the correctness of the doctrine of dedication and the sale of undivided and proportionate interests and the rule of equality between water users and rejects all priorities as between the settlers who have binding contracts; but it limits all contracts to the available supply as determined by the Secretary of the Interior. It imposes as a fundamental and supreme limitation on the State laws and all contracts made thereunder that water rights on Carey Act projects cannot be sold beyond the acreage for which patent may be obtained, and that all contracts entered into after such limit has been reached are null and void, and cannot operate to defeat the title of those who purchased before such limit was reached, nor deny them the opportunity to obtain patent to the lands which they entered.

This question was not discussed at the hearing or in the oral argument, and if this Court rejects the proposition that the Secretary must issue patent if

the works have been constructed in accordance with the plans which he approved when the segregation was made, then we respectfully submit that appellants should be permitted to be heard upon the proposition stated above.

It must be apparent that a tremendous loss will result to all parties and the conditions under the project be greatly unsettled unless a principle or doctrine is established by the Court by which it may be determined to whom patent shall issue, in the event the Court holds that the Secretary is not required to issue patent to all the lands in the segregation that have become entitled to water from the system in reliance upon his decision at the time the segregation was made. No individual or board should be held to have the arbitrary and autocratic power to say who are entitled to water and who may receive title from the Government in the event the settlers are not all entitled to patent; and we submit that if the Court departs from the doctrine that the Secretary is bound by his former decision, then the only feasible and practical solution of the unfortunate situation confronting the project must be that there is no priority between the purchasers who acquired water rights for the acreage that the Secretary is willing to patent under this project, but all contracts entered into after such acreage had contracted for water are without force or effect. In other words, the doctrine of no priority between water users announced by this Court in its decision would be applicable only to the acreage that may be

reclaimed from the available supply under a duty of water to be fixed by the Secretary of the Interior, and under that rule the rights of all parties must remain in suspense and cannot be adjudicated or determined by the Courts, or by any other authority, until the Secretary has determined the acreage that he is willing to patent, and the persons entitled to patent be ascertained by taking the contracts in the order in which they were entered into until the aggregate thereof reaches the acreage which the Secretary has signified his willingness to patent.

This is but an extension of a doctrine that has frequently been applied to private irrigation projects in the West where water rights have been sold in excess of the carrying capacity. In this case the rule of priority would be applied only as between those who purchased before the available supply had been exhausted and those who purchased after that point had been reached. Under this rule the Secretary of the Interior would determine the extent of the proportionate interest each settler acquires, and the limit of the proportionate interest that may be sold in the system will be the acreage which the Secretary is willing to patent.

V.

Costs.

This Court ordered that each party should pay its own costs on appeal. We respectfully submit that that is unfair to appellants. They were clearly justified in taking the appeal and could not in fact do otherwise, and no unnecessary costs were incurred

by them on appeal; and there would seem to be absolutely no reason for departing from the almost universal rule of permitting a successful appellant to recover his costs. The opinion does not show any mitigating circumstance that would justify a departure from the rule, neither does it set forth any reason for imposing this penalty on appellants, and it is respectfully submitted that the errors committed by the trial court were committed in an attempt to comply with the views of appellees. Hence whatever error there is in the record justifying a reversal the responsibility therefor should be laid to appellees, and there is no reason for relieving them from the payment of costs.

Respectfully submitted,
S. H. HAYS,
RICHARDS & HAGA,
Solicitors for Petitioners.

State of Idaho,
County of Ada,—ss.

I, OLIVER O. HAGA, of counsel for petitioners above named, do hereby certify that in my judgment the foregoing Petition is well founded, and that it is not interposed for delay.

Dated June 8, 1917.

OLIVER O. HAGA,
*Solicitor and of Counsel
for Petitioners.*

No. 2725

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND
WATER COMPANY, a Corporation, SALMON
RIVER CANAL COMPANY, LIMITED, a Cor-
poration, COMMONWEALTH TRUST COM-
PANY OF PITTSBURGH, Trustee, and A. C.
ROBINSON, *Appellants*,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES
HAROLD M. SIMS, in their own behalf and in be-
half of all persons similarly situated with them,
Appellees.

Supplemental Petition of Appellants for Rehearing or Modification of Decision.

*Upon Appeal from the United States District Court
for the District of Idaho, Southern
Division.*

S. H. HAYS,

*Solicitor for Appellant, Twin Falls-
Salmon River Land & Water Co.*

Residence: Boise, Idaho.

F. D. Monckton,
Clerk.

No. 2725

IN THE

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HAROLD M. SIMS, in their own behalf and in be-
half of all persons similarly situated with them,
Appellees.

Supplemental Petition of Appellants for Rehearing or Modification of Decision.

*Upon Appeal from the United States District Court
for the District of Idaho, Southern
Division.*

*To the Honorable the United States Circuit Court
of Appeals for the Ninth Circuit:*

Your Petitioner, the Twin Falls-Salmon River

Land & Water Company, one of the appellants in the above entitled cause, respectfully petitions this Honorable Court, as follows:

1. To amplify the decision herein in order to make clearer certain questions which arise from the decision.

2. To grant a rehearing herein upon certain points hereinafter more fully specified.

The questions decided in this case go to the foundations of irrigation development under the Carey Act. The questions are broad ones and many of them have been but slightly touched upon in the briefs or argument. The questions decided are of first importance. Owing to the manner in which the case came up in the Court below, the argument of the case in this Court was directed too much to simply procuring a reversal of the case rather than to a broad discussion of the problems involved and which the case deserved.

Mr. Haga, on behalf of appellants, has filed a petition for rehearing or modification of the decision and has suggested that we file a supplemental petition.

Upon reading the opinion of this Court, counsel on both sides are confronted with the problem—What is the lower court to do with the case? What questions remain for decision and what course shall be pursued?

In order to aid this Court in understanding our problems, we will state what we believe the Court

has decided and what we believe the effect of the decision is so that the Court may correct us if our views are inaccurate.

It is our view that the Court has decided:

Nature of Grant.

1st. That the grant to the State was not a grant in praesenti, but, on the contrary, "such States were made the agency through which the lands might be reclaimed and the terms and conditions were therein prescribed by Congress, on the performance of which, the title of the United States thereto should pass by patent of the government." We understand the Court to hold that the grant is one conditioned upon the building of the irrigation works and the furnishing of an ample supply of water for the reclamation of the land. We do not differ upon this point with the Court in substance. We do say, however, that the question as to water supply was decided by the Secretary of the Interior at the time when he segregated the land and that this is a reasonable construction to give to the statute for the reason that the water supply is not a thing that can thereafter be affected and changed by human effort. It was a thing that the Secretary ought to have decided in advance and which he did decide in advance, and we contend that this decision so made is final. The difference between ourselves and the Court is merely as to the *time* when the Secretary's final de-

cision is made as to the sufficiency of the water supply.

We also say that the lien which the Act of Congress authorizes was a lien to be fixed in advance of the construction of the works; that this lien was actually fixed upon the acreage of land which the ditches were built to cover and that this lien ought not to be defeated by a change of the Secretary's decision as to the sufficiency of the water supply and that the statute did not contemplate that it should be. This will be more fully considered hereafter.

All parties had notice of the law and the effect of State supervision.

2nd. We understand the Court to say:

"That the laws of the State applicable to the appropriation and use of the non-navigable waters of the State are controlling is of course clear, *and that all parties contracting with respect to such waters and desert lands do so with at least the presumed knowledge of both the Federal and State laws* is also plain." (p. .)

The Court also says: (p. .)

"The construction company, the settlers and the parties who furnish the money for the building of the system receiving as security therefor the liens authorized both by Congress and the State *are therefore each and all charged with full knowledge of the laws and provisions of the contracts.*"

We understand the Court to mean that the con-

struction company, the settlers and the bondholders all went into this enterprise with knowledge and notice of the provisions of the law; with knowledge and notice that the project might not prove successful, and, if not successful, that all parties, including the construction company, the bondholders and the settlers, might suffer loss. That the settlers might never get patent to their land and the construction company might not obtain a lien thereon. We understand the Court in this way gives due effect to the provisions of the law providing for State supervision.

The statute of the State (Sec. 1615 R. C.) did not require the promoters of the project to make any representations whatever in regard to the water supply; this was so for the reason that it was intended that the officers of the State should examine into and decide the question as to the sufficiency of the water supply and that after they had decided this question, it was to be presented to the Secretary of the Interior for decision; that the question of water supply did not rest upon any guaranty by promoters or upon any representations by promoters; that it rested wholly upon the examination and decision of the State and National authorities; that the works to be built for utilizing the water supply were likewise works decided upon and approved by the State and National authorities; that the whole purpose of the law was to provide for State supervision

and do away with any necessity for representations by promoters; that for this reason and on account of the notice all parties had of this and the other laws affecting the project, no right of action arises in this case out of a mistake of the State or National authorities in regard to the sufficiency of the water supply.

Settlers' Water Right.

3rd. We understand the Court to hold that water is to be distributed to the settlers at the rate of .01 of a cubic foot of water per second of time for each acre of land under rules and regulations which, by the terms of the contract, are to be provided by the company and that such head of water or such supply of water is to be delivered to the settler at such times and in such quantities as the condition of the weather and the crops may determine, and that the water is to be delivered under a rotation system instead of a continuous flow; that this supply of water is to be delivered to each settler in proportion to his needs and without discrimination; that is to say, that each settler, having a valid entry upon the project and holding a contract under which he is entitled to water, shall be entitled to a delivery of water such as is mentioned above to the extent of the available supply.

A very important question arises here. There are fifty-seven thousand acres of valid entries upon the project. Of this area the owners of forty thousand acres approximately have cultivated a large

portion of the total area of their entries. The remaining acreage is in different states and conditions. Some of it has been cultivated and final proof made to the State (under Sec. 1628 R. C.), and thereafter, little if any cultivation has taken place upon it, the owner simply awaiting the conclusion of the litigation. Other areas are in various states of development. The owners of the fifty-seven thousand acres hold contracts, however, entitling them to water.

We understand the Court to hold that there is no priority among these settlers. It is so expressly provided in the contract which the Court quotes and in addition to this, the statute of the State provides (Sec. 1615 R. C.) that the proposal made to the State Land Board shall state the source of water supply, the location and dimensions of the proposed works and estimated cost thereof and

“the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to embrace a proportionate interest in the canal or other irrigation works together with all the rights and franchises attached thereto.”

In the beginning, a water right is taken out by the company proposing to build the works in bulk for the entire acreage to be reclaimed. Since the water right is taken out in bulk for the benefit of the entire area, the statute very naturally provided that those who took their rights under this appropriation

should be on an equality and that their rights should be *proportionate*. The statute above quoted fixes this. It is this statute and not the contract which determines the matter. The contract merely follows the statute as it must and states in terms that the interest which the settler acquires is only the proportionate interest defined by the statute (Par. 6, State Contract, pp. 373-4, record). The provision of the statute giving to each settler a proportionate part of the water supply is obviously entirely reasonable and intended to do equity among the settlers, but from this very equality of right and the fact that there is no priority among the settlers, there arise important conditions. All of the settlers upon the project have an equal right to the water supply and are entitled to have delivered to them a head of water amounting to .01 of a cubic foot of water per second of time for each acre of land under a rotation system and under suitable rules and regulations, such water supply to be delivered to each of them in proportion to their needs until the entire supply is exhausted. The canals have been properly built to deliver an adequate supply of water. The reservoir likewise has been properly built. For some years past, the water supply has been scanty. During the present year, we find the largest water supply the project has ever had, the sufficiency of which would probably be admitted. It seems to us that under the opinion of the Court we are bound to treat every settler upon the tract in proportion to his

needs exactly as every other settler is treated and deliver water proportionately. The appellants contended that there was no specific water right given to the settlers in the sense only that there was no right to $2\frac{3}{4}$ acre feet of water per acre. The appellants did, however, contend that the settlers had a proportionate right and that this arose from the statute and also from the terms of the contract; also that this right was a right to have a head of water of .01 of a cubic foot of water per second of time delivered under the terms of the contract, as the Court has stated in the opinion. It appears that the word "specific," in referring to the water right, has been understood in different ways and perhaps has been used in different ways and this may give rise to some misapprehension. Some people have contended that the water right which the Court has stated in the opinion the settler is entitled to is not a specific water right but only a proportionate interest in the supply. This amounts, however, merely to a criticism of the use of the word "specific." A water right, as defined by the Court, is in substance what appellant contended for with the understanding that the company is bound to deliver water to the extent of the available supply and no more; that is to say, that there is no liability for the inability to deliver a greater supply than nature has provided.

The sufficiency of the water supply was determined by the State and National authorities before

the building of the works. The statute did not prescribe that any representations whatever (Sec. 1615 R. C.) as to the sufficiency of the water supply should be made by the persons proposing to build the works. The question of water supply was to be determined solely by the State Engineer (Secs. 1619-20 R. C.). Later on, to be approved by the Land Board and then by the Secretary of the Interior. If both the State and National authorities erred in regard to the sufficiency of the supply, this is not the fault of the persons constructing the works, although they also thought the supply was sufficient. It was not intended, and the statute did not provide, that the matter of water supply should rest upon the representations or guarantees of the promoters of the project. The decision as to the water supply rested entirely with the State and National authorities. A water supply of .01 of a cubic foot of water per second of time to be delivered under the rotation system as the needs of the crops require was a provision relating to the method of distribution of the water supply which had been previously determined by the State and National authorities to exist. The State Contract and the contracts with the settlers were all entered into shortly after the approval by the State and National authorities of the sufficiency of the water supply and of the works to be built and these contracts were entered into in view of such approval. The matter being a matter determined by the State before the making of the contract, and not

a matter depending upon representations, there is no liability on account of the failure to deliver a greater water supply than nature has provided, and for this reason, among others, the action could not be maintained.

Authority of Secretary of the Interior.

4th. We understand the Court to hold that the area which can be irrigated and for which patent to the State is to be issued, is purely a question of fact and that the decision of the Secretary upon this point is final in the absence of fraud. That it is not a question for the Court in any respect, and, if this is true, then there is nothing for the lower court to determine with regard to the area to be irrigated, and in effect there is nothing left for the lower court to do except to dismiss the case, barring the one point of entering an injunction against future sales, over which there is no controversy as it is not desired to make more sales. We understand the Court to hold that it will be incumbent upon the Secretary to determine what area he will permit to be patented; that, in effect, the Act of Congress was a grant upon a condition subsequent depending entirely upon the final success of the project. The Court, in referring to the matter of the water supply and the area to be patented says in the opinion:

“It is obvious that whether or not such a supply is actually furnished is a pure question of fact and that all questions of fact in relation

to all of the public lands are matters for the exclusive determination of the officers of the Land Department has been so many times decided by the Supreme and other Federal Courts as to render the citation of cases unnecessary."

We agree to the principle of law to the effect that all questions of fact in relation to all of the public lands insofar as they are administrative in nature are matters for the exclusive determination of the officers of the Land Department. The provision of the Carey Act, however, is unusual. The statute provides that the plan shall be presented to the Secretary for his approval. Upon his approval, the land is segregated and at the time of the segregation the Secretary of the Interior enters into a *written contract* with the State by which it is agreed that the lands shall be patented to the State. In this contract the Secretary may embody the terms of the law. He cannot add qualifications. The contract follows the terms of the law only. The matter, when the segregation is made, rests upon *contract*. The Government has contracted to convey the lands to the State upon certain conditions, the fulfillment of which will entitle the State to a patent. Under these conditions, we say that the Secretary has not the authority to finally decide as to whether this contract has been complied with. He stands in the same position as any other party to a contract. Since this matter rests on *contract*, we have the right to resort to the courts to enforce it and to have the matter de-

terminated in court. There is no decision of the Federal Courts that we are able to find which, under such circumstances, gives to the Secretary the exclusive power to determine whether a contract has been complied with or not. In this respect the Carey Act is peculiar and the rule of law mentioned by the Court does not apply. If this view of the law is correct, then there may be a question for the lower court to determine in regard to the area of land which is to be patented and which is to be irrigated by the available water supply. The Secretary of the Interior administers the land laws, and under these laws questions of fact as to whether persons are entitled to land or not are settled by the Department. All matters involving land "entries" which do not involve contracts are decided and settled by the Secretary. Contracts for construction made with the Government, where many questions arising under the contract are to be decided by engineers or architects, are, of course, common and the contracts made provide for decisions to be so made, but there is no provision of that kind here. There is no provision that the Secretary shall decide the matter and he has no such power under any statute in a matter arising under a *contract*, therefore the rule mentioned by the Court does not apply.

Nature of Project—Plan of Development.

5th. In speaking of the project, the Court at one place in the opinion says that the compensation of

the construction company for the liability assumed
 “must of necessity come from the sale of the
 lands and of rights to the appropriated water.”

The expression “sale of the lands” is evidently here used in what might be called a colloquial sense rather than a strictly legal sense. It appears to us that in some respects the opinion treats the transaction between the parties as a *sale*. This should be understood, however, only in a very limited sense. The Construction Company makes its proposal to the State for the building of the works. At the same time it makes a water appropriation. A nominal fee is charged by the State for this appropriation. (Sec. 3253 R. C.). This water supply under the statute and under the contract becomes appurtenant to the land to be irrigated. This method is adopted simply as convenient machinery for the purpose of annexing the water right to the land. The land is granted to the State. The State sells the land to the settler and obtains fifty cents an acre therefor, which is the entire sum which the settler pays for the land. The water belongs to the State but it provides by law, as above stated, the machinery whereby, in cases of this kind, the water is to be attached to the land. It is erroneous to say that the company receives anything whatever from the “sale of the land.” The company builds the works and sells shares in the works with the attached water right to the settlers. The settlers receive under the statute (Sec. 1615 R. C.),

“a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto.”

The rights and franchises attached thereto have been held by the State Court in construing this statute to mean the water rights belonging to the project.

State ex rel. West vs. Twin Falls Canal Co.
21 Ida. 410 (423).

This decision construing this State statute ought to be followed by this Court. The Construction Company is paid for the investment it makes by a lien upon the land which is to be benefited, but this lien is a limited one. It is limited,

“to the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers.”

The amount paid for a water filing no doubt might be included in the lien given the company under the head of “necessary expenses of reclamation.” But that is a very small item. The thing which the company is paid for doing and for which it is entitled to a lien is for the building of the works. As cited in the original and supplementary briefs, the Land Board of this State has always considered the company in the attitude of a “construction company” whose only business it was to build

the works in accordance with the terms of the contract.

Rules and Regulations of Land Board June 10, 1905; Oct. 16, 1909.

State ex rel. West vs. Twin Falls Land Co. 21 Ida. 410 (bottom p. 424).

The law in regard to the fixing of a lien followed in substance the irrigation district law which at the time of the enactment of the Carey Act had become quite popular in many western States. The irrigation district law provides for a settlement in advance, of the character and nature of the works to be built and an estimate of their cost and the fixing of a lien upon the land for the benefit conferred. Such was the procedure here. The State was authorized before the building of the works to fix a lien upon the land.

The State owned the water. The land was to be granted to the State by the Government. The Construction Company made an application for a water permit merely as a method of attaching the water which belonged to the State to the land which was to be granted to the State. It did not receive compensation for the water to be delivered to the settlers except only in the small incidental way that it may have been repaid for the cost of making the water filing. The lien was granted to the company and it was paid for the *building of the works*. The company was not required by the statute to make any

representations as to water supply. That was a matter which the State determined through its proper officers and which the Secretary of the Interior later on determined. As a means of equitably distributing the water supply among the settlers, the statute provided that the shares in the system should represent a proportionate interest in the water supply and that this should be a perpetual as opposed to a rental right. At the time of the making of the contract, the State and National authorities had fully determined that the water supply was sufficient, and for this reason, there remained nothing to do except to describe the method whereby this water supply should be delivered to the settler in order that the rights of the settlers as among themselves should be equitably adjusted. In doing this the contract first provided for a certain ditch capacity and it next provided that the settler should be entitled to receive water at the rate of .01 of a cubic foot of water per second of time; in other words, this was the "head of water" which he was entitled to receive. In the interest of economy of water supply and the benefit of the entire system, it was provided that the rotation system should be used and that water should only be applied when the condition of the weather and the crops made it necessary. The whole subject of water supply, so far as the water contracts are concerned, was, however, approached from the standpoint of a supply that had been predetermined to be sufficient. While we speak of the

proportionate interest in the irrigation works and the appurtenant water supply as a "sale of a water right," still, we should also take into consideration the particular sense in which this colloquial phrase is used in connection with the Carey Act.

Lien Under the Carey Act—Construction of the Statute.

6. The amendment to the Carey Act of June 11th, 1896, provided as follows:

"A lien or liens is hereby authorized to be created to the State to which such lands are granted and by no other authority whatever and *when created*, shall be valid on and against the separate legal subdivisions of land reclaimed for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers."

The whole plan was one for construction of works. The statute of the State providing that any person or corporation might make a proposal for the construction of the works amounted to an advertisement for bids. The proposal filed with the Land Board amounted to a bid. The examination of the plans for the works and the determination of the water supply by the State Engineer was very similar to the acts of the architect on behalf of the owner of a property in passing on the sufficiency of the construction plans. The plans having been approved by the State and National authorities, the contract

for construction is made. Now, in all construction work, it is necessary to determine, first, the thing to be built; and, next, the cost thereof; and so here, it was necessary to determine what canals or other works were to be built, what area of land was to be covered, and in order to provide for the payment of the money for the building of the works it was necessary to determine in advance the lien to be fixed upon the land which was to be benefited by the construction. The entire plan contemplated and the State statute specifically provided for the fixing of a lien at the time of the making of the State Contract in advance of the construction of the works. The sufficiency of the water supply had then been decided on and there remained then nothing to do except to construct the works.

The act of June 11th, 1896, provided that the lien should be valid "when created" against the land to be improved. The State authorities fixed the lien; they decided the acreage to be irrigated; they provided for the opening of the land for settlement. The construction company was required to sell shares in the system with the appurtenant water right to all persons settling upon these lands upon demand and upon compliance with the terms of the contract. The Secretary segregates the lands in order that a lien may be fixed upon it and this lien is valid at the time of its creation. If the Secretary may thereafter change the area to be irrigated, he would in effect be permitted to revoke the lien which had

been created. The settler settles upon the land when the State throws it open for settlement. If the Secretary may change the area of the project, he may prevent the settler from obtaining title to his land. In answer to this it may be said that it is provided that the lien shall be valid "on and against the separate legal subdivisions of land *reclaimed*."

In this connection, consideration must be given to the circumstances under which the State contract creating the lien is entered into. It is not entered into until the State authorities have found the water supply sufficient and the Secretary of the Interior has likewise approved it, otherwise the segregation is not permitted; in other words, the Secretary must pass on the sufficiency of the water supply at the time of the segregation and no segregation can be made unless this supply is sufficient. No human effort can change the water supply. It is reasonable that the Secretary should finally pass upon it at this time. The water supply being found sufficient, there is nothing then remaining to be done except to build the necessary works to conduct the water to the land. This is the way in which the land is "reclaimed."

The original act of August, 1894, provided that the land must be

"irrigated, reclaimed, occupied and not less than twenty acres of each one hundred sixty acre tract cultivated by actual settlers."

But the amendment of June, 1896, did away with all this and provided that

“When an ample supply of water is actually furnished in a substantial ditch or canal * * *
* to reclaim a particular tract or tracts of such lands, then the patent shall issue for the same to such State *without regard to settlement or cultivation.*”

We say that considering the fact that the area to be irrigated must of necessity be predetermined and the works built, and considering also that the lien must be fixed in advance upon this area and that the settlers must settle upon the land long prior to the time when patent is issued, that the “ample supply of water” mentioned in the statute merely refers to the supply which the Secretary has already passed upon in segregating the land and that patent for the land should not be defeated by a series of dry years or by the change of mind on the part of the Secretary. The Secretary undoubtedly has the right to pass upon the sufficiency of the water supply. We believe from the nature of the work and the conditions surrounding these projects that he passes upon it finally at the time of making the segregation. The Court seems to have held otherwise on this point, and upon this point we request a rehearing or modification of the opinion.

In conclusion, we urge that a rehearing be granted upon the question of the construction of the statute.

That there be some amplification of the opinion as to the other matters herein indicated.

Respectfully submitted,

SAMUEL H. HAYS,

*Solicitor for Petitioner, Twin Falls
Land & Water Co.*

I, Samuel H. Hays, Counsel for Petitioner above named, do hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for delay.

Dated June 11th, 1917.

SAMUEL H. HAYS,

Solicitor for Petitioner.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Ninth District

**TWIN FALLS-SALMON RIVER LAND & WATER
COMPANY, a Corporation, SALMON RIVER
CANAL COMPANY, LIMITED, a Corporation,
COMMONWEALTH TRUST COMPANY OF
PITTSBURGH, Trustee, and A. C. ROBINSON,**
Appellants,

vs.

**A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES W.
BEAUCHAMP, CARL WASHBURN and HAR-
OLD M. SIMS, in their own behalf and in behalf
of all persons similarly situated with them, Ap-
pellees.**

SUPPLEMENTAL BRIEF OF APPELLANT
Twin Falls-Salmon River Land and Water Company

SAMUEL H. HAYS,
Solicitor for Appellant,
Twin Falls-Salmon River Land and Water Company.

Filed

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F. D. Monckton,
Clerk.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

**TWIN FALLS-SALMON RIVER LAND & WATER
COMPANY, a Corporation, SALMON RIVER
CANAL COMPANY, LIMITED, a Corporation,
COMMONWEALTH TRUST COMPANY OF
PITTSBURGH, Trustee, and A. C. ROBINSON,
Appellants,**

vs.

**A. E. CALDWELL, W. F. MIKESELL, V. E. MOR-
GAN, J. E. POHLMAN, W. C. POND, JAMES W.
BEAUCHAMP, CARL WASHBURN and HAR-
OLD M. SIMS, in their own behalf and in behalf
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SUPPLEMENTAL BRIEF OF APPELLANT

Twin Falls-Salmon River Land and Water Company

STATEMENT.

Since this case was argued two additional briefs have been filed amici curiae and a number of cases have arisen in the State courts which involve questions here at issue.

Since this is the first case of this kind brought to this Court, and as the decision will probably go to the very foundation of the contracts made under the Carey Act method of reclamation, it is extremely important that the

case be fully presented. In the original brief some of the points at issue were but lightly touched upon, and the case was presented merely from the standpoint of securing a reversal of the decision of the lower court. Considering the nature of the case, a broader discussion of the problem is necessary and desirable. Therefore, in the present brief, we will present an outline of the whole Carey Act plan and discuss the case from that standpoint.

The Act of Congress of August 18, 1894, known as the Carey Act, provided for the granting to each of the States in the arid region of one million acres of desert land, provided the State would secure its reclamation. The Act of June 11, 1896, authorized the State to create a lien, valid against the land, for the actual cost and necessary expenses of reclamation, with reasonable interest thereon.

The State by its statute (Sec. 1615, R. C.) provided that any person desiring to construct irrigation works, under the provisions of the Act of Congress might file a proposal for the construction of the works and a request for the segregation of the lands. Under the statute (Sec. 1618, R. C.) it became the duty of the State Engineer to examine and report upon the feasibility of the project, the sufficiency of the water supply, and other similar matters. Upon a favorable report being given the proposal is presented to the State Board of Land Commissioners for approval, and if approved (Sec. 1619, R. C.) the proposal and request is filed in the local land office and transmitted to the Department of the Interior. Upon approval by the Department (Sec. 1621, R. C.) the State enters into a formal contract for the construction of the works with the

parties submitting the proposal. The contract must contain complete specification of the works to be built, the cost to the settlers, and the terms on which the State will dispose of its lands. The terms of the contract are provided by statute (Sec. 1621-3, R. C.). This contract is commonly called the "State Contract." Subsequently contracts are made with the individual settlers, called "Settlers Contracts," under which the settlers agree to pay the lien upon the lands entered by them.

At the time of filing the proposal a water permit is taken out in the State Engineer's office for the irrigation of the entire body of land. This permit authorizes the diversion from the stream of a certain number of cubic feet of water per second for the irrigation of the entire body of land (Sec. 3253 R. C.). Under the statute (Sec. 1615, R. C.) the right of the settler to the water represented by the permit taken out for the entire tract is a proportionate interest therein.

In this case, a proposal to build works for the irrigation of 150,00 acres of land was filed with the State Board of Land Commissioners. The proposal was, after examination, approved by the State Engineer, who reported that the water supply was sufficient for the irrigation of 150,000 acres of land. The water permits were approved. Thereafter the State Land Board approved the project, the Department of the Interior likewise approved the project, and the State then entered into a formal contract for the construction of the works with the successors in interest of the persons making the original proposal. The works have been completed and in operation

since 1911, more than 30,000 acres being irrigated in the season of 1914 prior to the commencement of this suit.

As previously stated, the project originally covered 150,000 acres. When the works came to be actually built, by an arrangement with the Land Board it was provided that the works should cover only 100,000 acres. Later on, when the lands were thrown open for entry, only 80,000 acres were opened for settlement. Of this amount, 73,748 acres were entered. At the time of the hearing a very considerable acreage had been forfeited, so that the project had been reduced in area to 57,348 acres (Sec. 1628 R. C.).

THE ISSUES.

It is claimed by the complainants that in the making of the contract between the State and the Construction Company (a defendant in the case) that it was agreed on behalf of the company that a water supply of 2.75 acre feet per acre during each irrigation season under a rotation system or a supply of .01 of a second foot of water per acre continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet per acre, would be furnished to the settlers.

On the part of the defendant it is claimed that no such promise was made; that under the statute a water permit is first taken out for the entire project in bulk; that this permit represents the supply for the tract, and that under the statute (Sec. 1615, R. C.) the interest of each settler in this water supply and in the works to be built is a "proportionate" interest; that the Company is related to the project simply as a construction company, building the works which the settlers are to thereafter own through the medium of an operating company, and that it did not enter

into any covenant, either temporary or perpetual, whereby it agreed to furnish the water supply claimed during each irrigation season; that the sufficiency of the water supply was first examined by the State Engineer, was approved by him and by the State Land Board, and afterward by the Department of the Interior, and that it is no longer open to question.

In addition to this the complainants aver that the water supply claimed is absolutely necessary for the irrigation of the lands; that the flow of the stream is insufficient to furnish such a supply, and that for this reason the lands will not be patented by the United States to the State, and therefore the settlers will not be able to obtain title to their entries, and for this reason they should not be called upon to make payment until a further water supply is furnished or the area of the project reduced.

The company claims that with reasonable use the existing water supply is sufficient for the present area of the project.

The State Engineer originally reported a water supply of 400,000 acre feet, which was deemed sufficient for the irrigation of 150,000 acres of land. The record of the water supply since taken shows a supply of 130,000 acre feet, available for the 57,348 acres now in the project. A water supply of 400,000 acre feet for 150,000 acres of land would mean 2.66 acre feet per acre, measured at the point of inflow into the reservoir. At that rate, 130,000 acre feet would serve 48,750 acres. Stated in another way, 130,000 acre feet for 57,348 acres would mean 2.26 acre feet for each acre.

Long prior to the construction of these irrigation works

the Salmon River, the stream in question, was estimated to have a flow of 1820 cubic feet per second, an amount of water the sufficiency of which for 150,000 acres would not even now be questioned.

See Vol. 1, Report of the special Committee of the United States Senate on Irrigation and Reclamation of Arid Lands. Report No. 928, May 8, 1890, Page 40.

As the flow of the stream from which the water supply is taken constantly fluctuates from year to year, it is important to the Construction Company to know just how long this question of the sufficiency of the water supply is open for consideration, and what the effect of the variation will be. From the record of the flow of the stream taken since the construction was commenced or completed it appears that there are considerable variations from year to year. Admittedly 1914-15 were very dry. Whether the late years during which measurements have been taken are average years or not, it is difficult to determine. We may illustrate this by the Weather Bureau records at the Boise station. The driest year on record at Boise was 1868, when the precipitation only amounted to 6.69 inches; the second driest was 1895, with 7.90 inches; the third was 1914, with 8.60 inches. The wettest year on record was 1875, with 25.80 inches; the second wettest was 1896, with 22.95 inches; the third was 1884, with 21.05 inches. The average is 12.71 inches. The records at Boise cover a period of 46 years.

Under the circumstances the vital questions to be decided are:

1. Was the approval of the project and of the suffie-

iciency of the water supply by the State Engineer and the Land Board binding on the State?

2. Was the approval of the Secretary of the Interior binding on the government?

Can the Secretary revoke his approval after the works are built?

Can patent be withheld after the works are built in accordance with the approved plan?

3. After the project has been approved by the State and National authorities and a formal contract entered into for the building of the works, and settlement thereafter made, can the settlers then object to the sufficiency of the water supply?

4. Does the State, in examining and approving the project prior to the settlement of the lands, act as the agent or trustee for the settlers thereafter to occupy the project?

5. Did the company make a contract to provide a water supply of 2.75 acre feet of water per acre during each irrigation season, or a supply of .01 of a second foot per acre continuous flow from April 1st to November 1st of each year, amounting to 4.16 acre feet of water per acre?

Or did it take out a right in bulk for the entire tract, and does the statute provide the interest which the settler has in such supply?

6. Where is the point of measurement of the water supply?

In order to determine these questions it is necessary to consider the plan of reclamation contemplated by the Carey Act and the procedure thereunder, and the character of the grant made by the United States to the State.

The Carey Act Plan.

In construing the act we must take into consideration the conditions existing at the time of its enactment.

Prior to the time of the enactment of the law there was a considerable demand that the general Government grant to each State in the arid region all of the irrigable land within its borders (See Report of the Special Committee, United States Senate, Irrigation and Reclamation of Arid Lands, 1890, Vol. 2, Page 143). It was in response to this demand that the Government made its grant of 1,000,000 acres of land to each of the desert land States.

The Irrigation District Law had shortly before been enacted in California. This law provided for the assessment of the cost of the building of the works against the lands benefited. With this in mind the act provided for the granting of a lien against the land to be reclaimed for the amount of the actual cost and necessary expenses of reclamation, with reasonable interest thereon.

The Carey Act was in substance a desert land law, and provided in terms that under this act the lands should be reclaimed "as thoroughly as is required of citizens who may enter under the said desert land law." The company building the works is related to the undertaking simply as a construction company, and this was explicitly stated in the Rules and Regulations of the Land Board.

Rules and Regulations adopted June 10, 1905,
page 6.

Rules and Regulations adopted October 16, 1909,
page 6.

State v. Twin Falls Canal Co. 21 Idaho, 410 (see
bottom page 424).

Idaho Irrigation Co. v. Lincoln County, 152 Pac.
1058 (1061).

It occupies much the same position as a contractor building works for an irrigation district with the difference that a lien on the land is given direct to the contractor instead of bonds being issued.

The Carey Act and the State legislation supplementary thereto was passed for the purpose of remedying certain difficulties which had arisen in irrigation development, particularly in the State of Colorado.

In that State and some others, under the original plan for the development of irrigation projects, water rights under canals were sold, and in addition to this an annual maintenance charge was made. This "water right" charge was either held invalid by the courts or wiped out by legislative enactments, leaving the ditch companies standing in the position of common carriers.

Mills Irrigation Manual, p. 141.

Finding this an unsatisfactory condition the companies, in many instances, made arrangements to turn over the canals to the settlers when the "estimated capacity" of the canal was sold. Much difficulty arose out of this arrangement. In some cases it was claimed that the canals were insufficient in size or improperly designed. In others it was claimed that the water supply was insufficient. In one case the contract provided that the water right was the right to "1.44 cubic feet of water flowing over a weir, per second." And the contract also provided that the "company agrees that when it shall have sold and have outstanding and in force a number of water

rights equal to the estimated capacity of the company's canal to furnish water" that it would turn over the system.

These two clauses of the contract led the courts to hold that the "estimated capacity should be considered to mean the building of the canal to supply water under ordinary conditions."

Wyatt v. Larimer & Weld Irrigation Co. 33 Pac.
144.

In some cases it was held that the later purchasers acquired no water right.

Blakely v. Ft. Lyon Co. 73 Pac. 249.

See Mead's Irrigation Institutions, pages 93-98.

See also Eaton v. Larimer & Weld Co. 83 Pac.
627.

La Junta Co. v. Hess 42 Pac. 50 and 71 Pac. 415.

Kinney on Irrigation, secs. 1516-19.

These difficulties led up to the idea which then prevailed that a cure might be found for these troubles in State supervision. This view was set forth by the State Engineer of Wyoming in his report for the years 1893-94, page 99. And in his report for the year 1895-96, page 20, in setting forth the advantages of the Carey Act, page 20-1, he enumerates the advantages as follows:

"1. Cheap land. Fifty cents an acre! less than one-half the price paid under the Desert Land law.

"2. A State guaranty that there is water enough in the source of supply and that the canal has sufficient capacity to deliver it."

See Mead's Irrigation Institutions, p. 25.

It was the idea under the Carey Act plan that the State should supervise the proceedings and should determine in advance the works that were to be built, the cost to the settler and the sufficiency of the water supply, and that the Company should stand in relation to the project as a construction company only.

The Idaho statute was copied from Wyoming, and the plan of procedure under it was as follows: Any person desiring to construct irrigation works to reclaim land under the Carey Act was required to file with the State Board of Land Commissioners a proposal to construct the works, which proposal must be accompanied by the certificate of the State Engineer that an application for a permit to appropriate water has been filed in his office together with the State Engineer's report thereon. The proposal must state the source of water supply, the location and dimensions of the proposed works, the estimated cost thereof, the price and terms per acre at which perpetual water rights representing a proportionate interest in the irrigation works and water supply would be sold to the settlers. With the proposal also is filed a request for the segregation of the lands to be irrigated (Sec. 1615, R. C.). This proposal may be considered as a bid for the doing of the work and the statute may be considered as an advertisement for bids. Following this theory a check is required to be deposited by the bidder (Sec. 1616, R. C.) in order to guarantee the execution of a contract with the State in case the bid or proposal is finally accepted.

In Idaho public waters are the property of the State.

Sec. 1, Art. 15, State Constitution.

In order to provide a convenient method of attaching a water supply to the project it is provided that the person filing the proposal shall file with the State Engineer an application for a permit to appropriate water for the reclamation of the lands. This application is in a form prescribed by the State Engineer and is accompanied by a map of the land in question and must show the location and dimensions of the works. It also requests leave to divert a certain amount of water in bulk for the irrigation of the entire tract. When the proposal and application for water permit have been presented they are referred to the State Engineer for his action and report thereon (Sec. 1618, R. C.). Under the statute the State Engineer must make a written report to the Land Board stating the following things:

1. Whether or not the proposed works are feasible.
2. Whether the proposed diversion of the public waters of the State will prove beneficial to the public interest.
3. Whether there is sufficient unappropriated water in the source of supply.
4. Whether or not a permit to divert and appropriate water through the proposed works has been approved by him.
5. Whether the capacity of the proposed works is adequate to reclaim the land described.
6. Whether or not the proposed cost of construction is reasonable.
7. Whether or not the maps comply with the requirements of the Department of the Interior.

8. Whether the lands are desert in character. (Sec. 1618 R. C.).

When the report of the State Engineer is received the matter goes before the Land Board for approval (Sec. 1619 R. C.). If the State Engineer's report is adverse the project must be dropped (Sec. 1620, R. C.). If satisfactory, the papers are presented to the local land office, with a request for the withdrawal of the land described in the proposal, and the papers are then forwarded to the Department of the Interior for approval by the Secretary.

The Act of Congress of 1894 provides that the State shall file a map of the said land proposed to be irrigated, which shall exhibit

“a plan showing the mode of the contemplated irrigation, which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation. And the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the filing of the map and plan of irrigation. But such reservation shall be of no force whatever if such map and plans of irrigation shall not be approved.”

While the papers are presented to the local land office for transmission to the Department of the Interior, and in order that the lands proposed to be irrigated may be noted on the land office plat, the plans are presented to the Secretary not for any merely preliminary action, but for approval.

The Company, as heretofore stated, is related to the project simply as a construction company and this is in

harmony with both the National and State laws. The statute setting forth the things to be specified in the contract provides only for construction matters (Sec. 1621-2, R. C.).

See *Sauve v. Guaranty & Surety Co.* 158 Pac. 112.

The Idaho contracts have frequently contained matter in addition to that prescribed by the statute. This has been done as a matter of convenience, and the additional provisions cover such questions as the location of highways (p. 58, Tr.), water supply for cities and towns (p. 59, Tr.), the method of transferring the system to the settler (p. 52, Tr.), and other similar matters not specifically covered by the statute. The State Land Board, however, is not authorized to insert in the Carey Act contract, matters for which no sanction is found in the statute.

State v. Des Chutes Land Co. 129 Pac. 764.

Every construction contract contemplates that the thing to be done shall be decided in advance. Where irrigation works are to be built it must be determined:

1. What acreage is to be covered.
2. The dimensions and grades of the ditches to be built.
3. The amount and sufficiency of the water supply.
4. The cost of the works.

Now the cost of the works determines the amount of the lien upon the various legal subdivisions of land, and this question of fixing the lien under a statute quite similar came up for determination before the Oregon State Land Board, in 1902. It was referred to Hon. George H. Williams, and in his letter to the Land Board (see Report of

State Land Board relative to desert lands, for the period ending Sept. 30, 1902, pages 24-5) he said, in relation to determining the cost in advance:

"I can see no reason for submitting such an estimate (of the cost) to the State Board, unless it is to furnish it with information upon which it could fix the amount of the lien in the contract. I do not wish to be understood as saying that the State Board is bound by this estimate. It may act upon any information derived from any satisfactory source. Estimates of architects and engineers for the construction of buildings, bridges, ships and other structures, are considered a safe basis upon which contractors agree to do the work for a specific sum fixed in the contract. And it would seem that an estimate satisfactory to the State Board might safely be made the basis for fixing the amount of the cost in a contract for the reclamation of arid lands. * * * To facilitate and encourage the reclamation of arid lands is the object both of Congress and the State by the legislation above referred to, and to that end the rights and liabilities of contractors and settlers should be made as certain as the law will allow. Persons would be much more likely to engage in enterprises of this kind if they knew at the start upon what they can depend as to their rights and obligations than they will if all is left to the contingencies and uncertainties of the future. I am of the opinion that the amount of the lien and the cost of maintenance should be fixed in the contract for the reclamation of arid lands, at the time the contract is made."

The decisions of the Supreme Court of the State of Idaho are to the same effect.

Idaho Irr. Co. v. Pew, 26 Ida. 272 (278).

The object of the act of 1896 was to fix the lien prior to patent.

In the debate in congress it was said:

"It is proposed now by this amendment to authorize those states to provide means by which liens can

be created, upon the land to be irrigated and that those liens shall be enforced up to the time that the land is patented to the settler."

See Proceedings 1st Sess. 54 Congress, p. 6222, Column 2.

In the plan presented by the State statute the bidder, or person proposing to build the works, presents to the State Land Board the plans and specifications of the works he proposes to build, a statement of their cost, and an application or permit for the appropriation of water for the irrigation of the lands. The State Engineer, acting for the State and the settlers, who are thereafter to occupy the tract, examines the plans, investigates the water supply and reports on the feasibility of the project and the sufficiency of the water supply. He is a public officer upon whom the law imposes this duty. If he disapproves, the project must be dropped (Sec. 1619 R. C.). If he approves the plan it then goes to the Land Board, thence to the Department of the Interior, thence back to the Land Board for the execution of a formal contract for the construction of the works.

This is a determination in advance as to what shall be built, the price to be charged the settlers, and the sufficiency of the water supply. This matter is in no respect left to the whim or caprice or judgment of the person proposing to construct the works. The whole matter must be first approved by the State and next by the National government. All these things are done before the execution of the contract between the State and the construction company, which contract fixes the lien upon the land; and it is not until after these things are done that

the land is thrown open for settlement (Sec. 1625, R. C.).

It is a well settled rule of law that where officers, such as the State Engineer and the Secretary of the Interior pass upon matters of this character, that is to say, when jurisdiction is delegated to them, that the disapproval or approval, as in this case, is conclusive.

United States v. California & Oregon Land Co.
148 U. S. 31.

Under the Act of Congress the plan presented to the Secretary of the Interior must be one

“sufficient to thoroughly irrigate said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation.”

The Secretary has the duty imposed on him of acting on the plan and approving or rejecting it. If he approves the plan his action is final.

In the annual report of the Commissioner of the General Land Office for 1911, pages 11 and 12, in speaking of these projects it is said:

“The importance of this (the examination of projects) cannot be overestimated, for not only will the lands remain segregated for a long period of time if the order therefor is once made, but in making such segregation the Department is practically committed to the feasibility of the proposition submitted by the State, and people thereafter dealing with the State are in a great degree entitled to regard the proposition of the State as having received the endorsement of the Department.”

This statement of the Commissioner may be criticised on the ground that it does not go far enough, but never-

theless it shows the recognition of the principle. In the instructions of the Secretary of the Interior, of March 9, 1909, 37 L. D. 489, in speaking of Carey Act projects it is said:

"In brief, the time to ascertain whether the lands are of a character subject to segregation under the Carey Act and whether there is water available for their reclamation is *prior to segregation*."

It was also said (page 491):

"The report must also describe the locations of the reservoirs, canals and ditches proposed to be constructed for reclaiming the lands and state whether the plan of irrigation through and by them is feasible."

From the very beginning the requirements of the Department (Regulations of Nov. 22, 1894, 20 L. D. 440) provided as follows:

"The State must give full data to show that the proposed plan will be sufficient to thoroughly irrigate and reclaim the land and prepare it to raise ordinary agricultural crops; for which purpose a statement of the amount of water available for the plan of irrigation will be necessary. The other data required cannot be fully prescribed, as it will depend upon the nature of the plan submitted. All information necessary to enable this office to judge of its practicability for irrigating all the lands selected must be submitted."

These instructions have been constantly repeated.

Instructions Sept. 20, 1889, 27 L. D. 635 (637).

Instructions Jan. 15, 1902, 31 L. D. 228 (230).

Instructions Apr. 9, 1909, 37 L. D. 624.

The nature of the works to be built must be determined in advance. The cost which fixes the amount of the lien

upon each acre is likewise determined in advance, and the courts have held that this determination is final.

Idaho Irrigation Company v. Pew, 26 Idaho, 272 (278).

It has sometimes been claimed that the action of the Secretary in approving the plan was not final, and that the lien which the statute provided should be valid "when created," should only be valid on the lands which were *afterwards* "reclaimed," and that patent would not issue until

"an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim * * * said lands."

In order to determine what is meant by this statute and whether or not the Secretary of the Interior may refuse, after the works have been built for the irrigation of the lands, to issue a patent, on the grounds that he does not think the water supply sufficient, we must take into consideration the legislation existing at the time of the enactment of the Carey Act, and the decisions under it, and how the question was determined as to whether land had been "reclaimed" or not.

As before stated, the Carey Act is a reclamation act. In fact it was expressly provided by the act of 1894 that Carey Act land should be reclaimed

"as thoroughly as may be required of citizens who may enter under the said Desert Land law."

Under the Desert Land Act (19 Statutes at Large, 377), it was provided that an entry of desert land might be made by paying the fee and filing a declaration under

oath that the entryman intended to reclaim a tract of desert land

“by conducting water upon the same within a period of three years thereafter.”

The act also provided:

“At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid,”

and upon payment of the fees a patent for the land would be issued to the settler. The Desert Land Law originally did not require settlement or cultivation. It merely required “reclamation,” and this was to be accomplished by building such a system of ditches as would carry to the subdivisions of land capable of being reached by the surface flow, a supply of water such as when let out of the ditches might spread over the accessible parts of the land and stimulate vegetable life. If the main ditches were thus constructed, with the required adequate supply of water to irrigate the lands for the purpose of cultivation, the reclamation contemplated by the State was accomplished, without showing actual use of the water in cultivation.

U. S. v. Mackintosh, 85 Fed. 333.

Connor v. U. S. 214 Fed. 522.

It was not necessary that a crop should be raised or that the water should be turned out over the land, when there was no crop to irrigate. The Secretary of the Interior held under this act,

“it appears by the printed form for taking proof that the rules of the office require that it should ap-

pear not only that the claimant has conducted the water on the land, but that he has raised an agricultural crop. There is nothing in the act that requires such proof to be furnished, and in the case referred to, I said I did not think a regulation of the office that such proof be furnished can be said to be in contravention of the act. I am disposed to modify the views thus expressed, as it may be a hardship in many cases to require proof of this character. The fact to be ascertained is, has the claimant of desert lands reclaimed the lands within the meaning of the act? * * * In all the arid districts where the desert act is in force it has been found that some years an agricultural crop may be raised with but little water, and in some instances with none. Taking a favorable year, the proof of an agricultural crop might enable the claimant to enter, and the following year and many years thereafter he might not be able to raise a crop with the amount of water owned by him in connection with the land he claims to have reclaimed. The act gives him three years to reclaim the land. It must be supposed that he has the full three years in which to construct his ditches and carry the water to his land, and prove up. If it is said that no other proof shall be received save that of a growing crop, he may be compelled to put his water on the land within a less time than provided for in the act, for he must have his water on at least four or five months before he can mature his agricultural crop. The act very clearly contemplates that the reclamation must be from a desert state to an agricultural one, and that is proved where it shows that the claimant is the owner of a sufficient quantity of water to irrigate the land claimed, sufficiently for agricultural purposes and has conveyed such water on the lands in such manner that he can use it for the purpose of irrigating his crop. The mere carrying of water on the land is not sufficient; it must be in sufficient quantities and in such manner that it may be distributed in such quantities that a crop can be raised by the aid of the water so conveyed to the land. I do not think it necessary to distribute the water

over the land as it is done in the course of irrigation.
 * * * Your regulations should therefore be so amended as to allow other evidences of the reclamation of land besides that of a growing crop. The raising of an agricultural crop may be evidence of reclamation, but it is not the only evidence that ought to be received, and ought not at any time to dispense with actual proof as to the character and the ditch quantity of water, etc., owned by the claimant. I do not wish to be understood as holding that the water must cover all of the land, but it must be carried to a part whence it can be distributed over the land, except where high points and uneven surface make it practically impossible that it should be done."

Instruction of Secretary Teller, 3 L. D. 385.

See also Case of Bill, 20 L. D. 61.

U. S. v. McKinney, 27 L. D. 516.

In 1891 the Desert Land Act was changed (26th Statutes at Large, 1096) by providing for a certain amount of cultivation to be done and also that a plan showing the mode of the contemplated irrigation must be filed at the time of making the entry,

"which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation."

It was also provided that no land should be patented under the act unless the entryman expended in permanent improvements on the land at least three dollars per acre for the tract reclaimed.

Under the Desert Act the sufficiency of the water supply was not submitted at the time of the making of the entry, but was held for final determination at the time

of making final proof. Under the Carey Act the matter is presented to the Secretary of the Interior for his approval prior to the construction of the works.

The Act of 1894 provided that 20 acres of each 160-acre tract of Carey Act land must be cultivated by the actual settler. But the Act of 1896 wiped out the provisions of the earlier act and provided that

“when an ample supply of water is actually furnished in a substantial ditch or canal * * * to reclaim a particular tract, then patents shall issue for the same to such state, without regard to settlement or cultivation.”

It will thus be seen that all questions of settlement and cultivation of the land were wiped out by the Act of 1896 and that all it was necessary to do was to build the works and provide a water supply in order to obtain patent. A provision for settlement and cultivation by entrymen remained however in the State law (Sec. 1628 R. C.), and is a prerequisite to obtaining title by the settler from the State.

It is well known that the water supply of streams in the arid region fluctuates considerably from year to year, so that the question of the sufficiency of the water supply for the irrigation of a tract of land must always be a matter of estimate. Then again, in a community where water is scarce and land is plentiful, it becomes seriously important in what ratio water shall be used and in what ratio land shall be used.

See Widtsoe's Principles of Irrigation Practice, pages 336-7.

This may be illustrated in this way: Thirty inches of water applied to one acre of land will give a yield of

21 tons of beets. The same amount of water applied to two acres of land gives a yield of 39 tons of beets. The same amount of water applied to three acres of land gives a yield of 56 tons of beets; the same again applied to four acres of land gives a yield of 65 tons of beets.

The same is true with all other crops.

See Widtsoe's Principles of Irrigation Practice, pages 248-50 and p. 274.

Where a settler has a certain water supply available it is frequently to his interest to use more land and less water per acre in order to get the greatest total yield from his water supply. This question of the economic use of water at the present time is most seriously important.

There is also another factor affecting irrigation projects and that is, that the same volume of water will suffice to irrigate two or three times as much land after it has been cultivated a few years as it will in the earlier stages of the project.

See report State Engineer of Wyoming, 1895-96, p. 42.

Taking the fluctuations of the water supply in the stream from year to year, the variableness of the seasons, and the fact that the same supply is two or three times as efficient on an old project as it is on a new one, it will at once be seen that the question of water supply is always a question of estimate. If the proof presented was not satisfactory the Secretary should not, of course, have approved the project. In this case no question of fraud arises.

When the plan is approved the question of the water supply is determined. The water supply is a thing that cannot be changed by human effort; the only thing to be done after the approval of the plan by the Secretary of the Interior is to build the works in accordance with that plan. The company has then performed its duty, provided it has done nothing adversely affecting the water supply originally provided for the project.

Under the original Desert Land Law where there was no settlement or cultivation it was necessary to determine by some means whether the water supply was sufficient. This depended upon the proof submitted; it was a matter of estimate. Under that act it is determined at the time of making final proof. A desert land entry is a mere notice of intention to reclaim land, and no question arises for decision by the Department until the final proof is submitted.

The plans presented under the Carey Act are something quite different. While they pass through the local land office for the purpose of enabling that office to enter a memorandum of the land to be irrigated upon its records, there is nothing for the local land officers to decide. There is, however, a very important question for the Department of the Interior to pass upon. The Department must determine whether the plans are feasible and the water supply sufficient. Having once given an approval of the plan and the works having been built, the Secretary cannot withdraw his approval. He is required in the first instance to approve or disapprove the project. If he has approved the project and the works have been built the patent must issue. The construction

of the statute and the right to the patent depend upon the determination of the time when the Secretary's decision is made. That is to say, whether it is made before the construction of the project or whether it is to be made afterwards.

From the standpoint of reason, of morals, and of law, the question of water supply must be decided by the Secretary of the Interior when the plan is presented to him. This is the purpose and object of such presentation. If the plan is not feasible it is the duty of the Secretary to reject it. If it is feasible it is his duty to approve it. When the Secretary gives his approval and sanction to the plan he gives it with the knowledge that the lands are being then and there segregated from the public domain; that upon his approval a lien will be fixed by the State under the statute upon the land, which lien must be paid by the settler; that enormous sums of money must be spent in constructing the irrigation works for the reclamation of the land upon the faith of the lien so established; and that hundreds of settlers must settle upon the land before the formal issuance of patent.

Those matters which after the presentation of the plans can be affected by human agencies, such as the construction of the works, are matters for subsequent determination; the others are not. The company building the works is a construction company only. It constructs the works as a contractor does in an irrigation district, and payment to it must be made from the liens fixed upon the land.

By his approval the Secretary says, if you build these works, the grant of land is earned.

The Carey Act took its color from the Irrigation Dis-

trict Law, and this was followed by the National Reclamation Act, which fixes a lien upon the land for the improvements made, the money being furnished by the Government without interest and the work being done through its agency. But on the National Reclamation projects as well as on Carey Act projects the water supply is a matter of estimate, and the interest which the settler has is a proportionate interest in the supply.

See pgs. 53-4, original brief.

The Carey Act in many of its provisions is similar to the Desert Land Act, but there are the important differences: Under the Desert Land Act the claimant on making his entry merely makes a declaration of intention. This is followed by the final proof at which time the questions involved are decided. At the time of making entry no question arises for decision. All of the questions are to be determined at the time of making final proof. There is no right reserved in the Land Department to reject the entry at the time the filing is made on the grounds that the plans for the irrigation of the land are not feasible.

The Desert Land Act vests the local land officers with the power to pass upon the questions involved in the desert entry only at the time of making final proof, and this right is vested in the local officers subject only to the supervisory power of the Commissioner of the General Land Office and Secretary of the Interior.

Some of our public land statutes do not vest any authority to make decisions in the local land offices. Such, for instance, is the case in scrip entries.

Cosmos Exploration Co. v. Gray Eagle Oil Co.
190 U. S. 301.

In such cases the right to decide the questions involved is vested in the Commissioner of the General Land Office. Under the Carey Act the decision as to the feasibility of the plan presented and the sufficiency of the water supply is vested in the Secretary of the Interior, and the right, power and duty to decide upon the matter is imposed upon the Secretary upon the presentation of the plans. That is what they are presented for.

It may be claimed that by the formal contract made with the State (See form 37 L. D. 634) that the Secretary has reserved the right to further consider the question of the sufficiency of the water supply and the feasibility of the plan. Cases of this kind have sometimes arisen out of the issuance of patents where limitations have been sought to be inserted by the Land Department. In the case of *Burke v. Southern Pac. R. R. Co.*, 234 U. S. 669, 58 L. Ed. 1527 (1952), the decision of Circuit Judge Sawyer in *Cowell v. Lemmers*, 21 Fed. 200, is quoted with approval, as follows:

"There is no authority to issue a patent which in effect only says, if the lands herein described hereafter turn out to be agricultural lands then I grant them, but if they turn out to be mineral lands, then I do not grant them."

See also *Davis v. Wiebold*, 139 U. S. 507, 35 L. Ed. 238.

Referring to the issuance of patent without proper investigation as to the mineral character of the land, the Court in the *Burke* case quoted with approval from Bar-

den v. Northern Pa. R. R. Co., 154 U. S. 288, 38 L. Ed. 992, as follows:

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if this has been done without fraud, though inadvisably, by officers of the Government charged with the duty of supervising and attending to the preparation and issue of such patent, the consequences must be borne by the Government until, by further legislation, a stricter regard to their duties in that respect can be enforced upon them."

The Court also quoted with approval from *Shaw v. Kellogg*, 170 U. S. 312, 42 L. Ed. 1050.

In that case no patent had issued, but to avoid title passing by the issuance of patent to the mineral land in the grant, the Commissioner prevailed upon the Surveyor General to conditionally approve the field notes and survey of the Mexican grant under consideration. The Court said:

"What is the significance of and what effect can be given to the clause inserted in the certificate of approval of the plat, that it was subject to the conditions and provisions of the Act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the land department. Its duty was to decide and not to decline to decide; to execute, and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It is an agent and not a principal. * * * Undoubtedly it could refuse to approve the location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location, provided no mineral land should ever thereafter be discovered; in other

words, that the locator must take the chance of future discovery of mineral. It was a question for its action, and its action at the time. * * * It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land, or else denying it altogether."

The Court, referring to the questions before it in the Burke case, said:

"Lastly, it is urged that the railroad company accept the patent with the mineral exception therein, and also expressly agreed that the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the Government transfers its title to public land are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibility are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals, but agents of the law, and must heed only its will."

The Supreme Court of Oregon, in *State v. Deschutes Land Co.* 129 Pac. 764, had before it provisions of the contract between the State of Oregon and a Carey Act company, wherein the company had agreed with the State that no settlers' contracts would be entered into until after the works had been constructed and notice that water was available had been given by the State. In that case the company disregarded the provision and entered into contracts in violation of such provisions of the State contract, and the State sought to enjoin the company from entering into settlers' contracts in advance of the time fixed by the State contract. The Court said:

"The question is whether the State Land Board had authority to insert the provision quoted in the contract with the defendant. By its legislation the State created the State Land Board as its agent to transact the business provided for in the act. There is no apparent authority, so called, in a public officer whose duties are prescribed by statute like there would be in the case of an agent for a private party. The representative of the State must have actual authority in such cases. The agent of the State, acting under a public law, must find sanction for his doings in the statute itself, and parties dealing with such agent are bound, at their peril, to take notice of the enactment conferring the agent's authority. A contract made by a public officer in excess of the provisions of the statute authorizing such contract is void, so far as it departs from or exceeds the terms of the law under which it was attempted to be negotiated. * * * Being a departure from the Board's authority, and this contrary to the statute, the provision is void and does not bind either party to the instrument, because the contract, to be efficacious, must be equally binding upon both parties. The defendant had a right to contract to do in the future what might legally be done under the provisions of that section (referring to the statute). While it would be within the scope of legislative authority to prevent actual settlers from going upon the land and stipulating with the corporations for the extinguishment of its lien, so that the settler could proceed unhampered in the establishment of his home, yet this species of paternalism was not vested in the State Land Board."

From a consideration of the whole situation, therefore, we say that the matter of the feasibility of the project and the sufficiency of the water supply was passed upon and approved by the State, and then presented to the Secretary of the Interior for his action; that he then had the power to decide the question of the sufficiency of the water supply and the feasibility of the project. That in do-

ing this in advance of the cultivation of the land he was only doing that which was customarily done under the Desert Act before the cultivation of the land. That from the standpoint not only of law, but of morals, it was his duty particularly to decide upon the question of the sufficiency of the water supply, because such supply was not a thing that could be changed by any human effort. After the decision of the Secretary of the Interior nothing remained that could be effected by human agencies, except the doing of the construction work; and as to this, we say that the Secretary must decide in advance as to what work is to be done. A large investment must be made after the approval by the Secretary and before the issuance of patent. The lands are segregated by the Secretary for the purpose of having a lien placed upon them, in order that the builders of the works may be compensated for their cost.

The question of the cost per acre is determined by the total cost and by the number of acres to be irrigated. The works may, and probably in every instance do, cost more than originally contemplated. But this makes no difference. The lien in favor of the construction company having been placed upon the land in the beginning cannot thereafter be changed.

Between the time of approval by the Secretary and the issuance of patent hundreds of people enter upon these lands, making homes and cultivating the lands in part, the State statute requiring that the lands be settled upon and one-eighth thereof be put in cultivation (Sec. 1628, R. C.) before the settler gets his final certificate from the State, which is issued to him before the patent is received by the State. The settler made his entry upon the faith of

the approval of the project by the State and by the Secretary of the Interior. He ought not to be expected, after the company has built the works and the settler has performed his agreement on his part, to then face the contingency of taking title either to none of his land or only to a part of it. The investor, after having put hundreds of thousands of dollars into the project, ought not to face the possibility that, after he has done everything possible that could be called for by human effort, that the Secretary of the Interior may change his mind and conclude that the water supply is insufficient and the project not feasible. The lien is authorized to be fixed after the approval of the project and before the construction of the works.

We therefore say that these questions must be decided by the Secretary of the Interior when the project is presented to him for his approval, and that such decision is final.

It is set forth in the bill that in order for settlers on the tract to comply with the provisions of the Carey Act and irrigate and reclaim their lands, it will be necessary for them to have 2.75 acre feet of water per acre delivered by rotation, or .01 (1-2 miner's inch) of a second foot, continuous flow, per acre throughout the entire irrigation season, amounting to 4.16 acre feet. This is put in issue by the answer. So that the question of whether or not the State will be able to obtain a patent for the land, which will inure to the benefit of the settlers, is a question for consideration in this case.

To summarize this question as to the issuance of the patent, we say:

1. The plan of the law provided for State supervision, and a determination prior to the acceptance of the project and the building of the works, of the sufficiency and feasibility of the works and the sufficiency of the water supply. It provided for the approval of the Secretary of the Interior prior to the making by the State of any contract for the construction of the works. After such approval it provided for the fixing of a lien upon the land for the cost of the works, by the State, such lien being fixed by the contract with the State. This lien was fixed for a certain amount per acre upon a certain area of land.

2. The State statute, followed the plan of the Act of Congress, and the Company building the works stands in the position of a construction company only. The amount of the lien, once determined, cannot be changed. It is settled by being fixed in advance of the construction. The plans presented to the Secretary of the Interior are presented to him for final action. His approval determines the question. The statute providing that "When an ample supply of water is actually furnished in a substantial ditch or canal * * * for reclaiming a particular tract * * * then patent shall issue for the same to such State" refers to the method of reclamation provided in the plan approved by the Secretary of the Interior; and since the amount of the water supply cannot be changed by human effort, the water supply referred to is the water supply which he has already approved. Where the works are constructed in accordance with the plan presented, patent for the land must issue, the water supply having been predetermined.

The lien is fixed by the State contract, and is earned by the building of the works, which is the only thing remaining to be done by human agency after the approval of the plan. The question of whether the land has been reclaimed or not is purely a question of whether the works have been built in accordance with the plans and with the contract with the State. The decision of the Secretary in approving the water supply when the plans are presented is final and conclusive. The officers of the State in examining and approving the plans act as agents or trustees for the settlers who are thereafter to occupy the project, and that the Secretary of the Interior is likewise in the same position.

Since the sufficiency of the water supply was approved by both State and National authorities, it is no longer open to question. This point being so determined is decisive of the case, and the complainants cannot recover because they voluntarily entered this land after the approval of the project and after the making of a contract for the construction of the works between the State and the construction company.

The determination of the State and National officers was final as to the amount of the lien, the nature and character of the works to be built, and the sufficiency of the water supply, and therefore there is nothing further to be considered. In the original brief this matter was but lightly touched upon and the case was chiefly considered from other standpoints.

The other principal question to be decided in the case is:

Did the company make a contract to deliver 2.75 acre feet of water per acre, under the rotation system, or .01 of a second foot of water per acre, continuous flow, from April 1st to November 1st of each year?

The Court held that the Company had made a contract to deliver a certain amount of water. It is our position that no such contract was made, but on the other hand, the settler is entitled by statute to a proportionate amount of the entire supply taken out for the project. We say that the lower court ignored the statute.

Water rights are taken out in Idaho by making an application to the State Engineer (Sec. 3253 R. C.). The application sets forth the source of the water supply; the location and description of the irrigation works; the amount of water to be diverted, and other similar matters. The application must be accompanied by a plan of the proposed works showing the character and dimensions of the works and the area and location of the lands proposed to be irrigated. The approval of this application gives to the person filing it what is known as a permit for the appropriation of water. It will be seen from the statute that the total area of land to be irrigated is given in the application and the total water supply which may be diverted to be used for that purpose is specified.

It is such an application or permit as this that is required to be filed under the statute at the time of filing the proposal for the construction of works under the Carey Act (Secs. 1615-1618, R. C.). This application is simply a request for permission to divert a certain

number of second feet of water from the source of supply. By the approval of the application by the State Engineer the consent of the State is given. The important thing that then devolves upon the State Engineer in Carey Act projects is to report (Sec. 1618, R. C.) whether there is sufficient

“unappropriated water in the source of supply and whether or not a permit to divert and appropriate water through the proposed works has been approved by him.”

Neither the application nor the water permit make any statement as to whether the amount of water sought to be appropriated is continuously to be found in the source of supply. The application simply calls for leave to divert a certain number of second feet from the stream. That is a matter which is left to the determination of the State Engineer (Sec. 1618, R. C.). This matter having been determined by the representative of the State, the statute steps in and provides that the water right, so called, sold to settlers, shall “embrace a proportionate interest in the canal or other irrigation works, together with all the rights and franchises attached thereto;” the “rights and franchises” here mentioned are the water rights.

State Ex. Rel. West v. Twin Falls Canal Co., 21 Idaho 410 (424).

The question here to be determined is, did the settler obtain the water right which is prescribed by statute? Or did the company contract to give him something else? It will not be presumed that the statute was disregarded, and, such being the case, it must prevail, and the interest

of the settler is therefore, a proportionate interest in the entire supply. .

Estimates, of course, are made by engineers in advance of the construction of the project as to what the water supply is. In this contract (page 49, Trans.) it was stated:

“It is agreed and understood that the dam hereinbefore mentioned shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream during the irrigation period, has been determined to be sufficient to furnish 2.75 acre feet of water per acre for each acre of land to be irrigated.”

This was undoubtedly the estimate made by the engineer based upon the data he had in hand. And this provision appears upon its face to be an estimate of this character. This is the only place in this contract where a water supply of 2.75 acre feet of water per acre is mentioned.

In drawing the contract it was necessary to determine the size or capacity of the canals to be built. The capacity of the canal governs the “head” that can be delivered, and therefore is a very important matter. The contract (page 48, Trans.) provided:

“And the second party promises and agrees to build and construct the canal and lateral system of sufficient capacity to deliver water to the users thereof at the rate of .01 of a second foot per acre for each acre of land to be irrigated.”

Again the contract provided (page 50, Trans.):

“Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of .01 of one cubic foot of water per acre per second of time. And each share

or water right sold, or contracted to be sold, as herein provided, shall also represent a proportionate interest in said canal and irrigation works, together with all rights and franchises therein."

In another place the contract provided (page 54, Trans.) that the certificate of share of stock in the operating company should represent "a water right of .01 of a cubic foot per second for each acre of land irrigated," as provided in paragraphs IV. and VIII. of this contract, being the paragraphs hereinbefore quoted.

The manner of the use of the water, however, was limited in the same paragraph in which the above quotation occurs or it was provided:

"While the party of the second part shall retain control of the said Salmon River Canal Company, Limited, water shall be measured to users from the place of diversion at the main laterals of such irrigation system in such quantities and at such times as the condition of the crops and the weather may determine, but according to such rules and regulations based upon a distribution of water to the irrigators in turn and by rotation as will best protect and serve the interests of all the users of water from said canal system."

Taking these provisions of the contract it will be seen that it was the estimate of the engineer that there would be 2.75 acre feet of water for each acre of land to be irrigated, running into the reservoir, that is, measured at the point of inflow. Furthermore, that the canal system was to be built large enough so as to deliver a "head" of .01 of a second foot of water. Next, that this "head" of water was to be delivered in a rotation system as frequently as the needs of the crops required.

In the draft of the Carey Act contract originally prepared in 1899 (see page 46, original brief), there was a provision for the delivery of a specified number of acre feet of water. Even this, under the statute, would have been merely the engineer's estimate as to what the proportionate interest of the settlers was. But this provision in Carey Act contracts was eliminated long before the making of the present contract (page 48, original brief).

The National Reclamation Act followed the same idea. Water was taken out in bulk for the entire project, and the amount which the settler obtains is a proportionate interest in the gross supply (see page 53, original brief).

The company does not own the land to be reclaimed. It has only a lien on it. Neither does it "own" the water. The State owns the water and the lands are to be patented to the State. The company is a mere agency to get the land and water together by means of the building of the works.

There is another question which affects this matter of the making of the contract for a specific amount of water. Not desiring to rest their case entirely upon the provisions of the contract, the complainants allege that the amount of water which they claim is *necessary* in order to reclaim the land so that it may produce agricultural crops. It was provided in the Act of 1894 that the land should be reclaimed as thoroughly as may be required of persons who may enter under the desert land law. Under the Act of 1896 the necessity for settlement and cultivation is done away with. But the plan which is to be presented to

the Secretary of the Interior under the Act is a plan which shall

“be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops.”

We take this as a definition of the amount of water thus necessary to reclaim the land and we admit that this question must be determined at some time. We say that the statute prescribed that the total amount of water necessary for the entire tract in bulk is specified in the water permit, and that the statute makes the interest of each settler a proportionate amount in the entire supply, and that when it was determined that the water supply was sufficient, both by the State and National authorities, that this was a final determination of that question in accordance with the terms of the act. And we furthermore say that the water supply is governed by the statute rather than by contract, and the decision of the lower court upon this point was clearly error.

Place of Measurement.

The report of the State Engineer was to the effect that “400,000 acre feet of water can be impounded annually.” This simply meant that that amount of water ran into the reservoir from the source of supply. In other words, this was the point at which the general supply of water was measured.

Now since each of the settlers has a proportionate interest in the water supply, and as some of them are much nearer the source of supply than others, it is necessary to fix a point at which the common supply of water shall

be measured out among the users. And in order to make this division equitable, it is provided in the State contract (page 52, Trans.), that "water shall be measured to users at the place of diversion from the main laterals of such irrigation system." A main lateral is defined in the contract as a lateral extending from the main line of the canal (page 27 Trans.).

The estimate made in the State contract of the capacity of the reservoir (page 48, Trans.) was an estimate of the total capacity of the reservoir; that is to say, that a reservoir having a capacity of ^{80,000}~~18,000~~ acre feet from which the water was constantly flowing during the irrigation season, would, with the inflow into the reservoir, furnish 2.75 acre feet per acre. That this is true is shown by the estimates made by the State Engineer. 400,000 acre feet for the total amount of the runoff for 150,000 acres of land would be somewhat less 2.75 acre feet per acre.

This and other points are discussed more fully in the original brief.

The company has no means of obtaining the money invested in this project except through payments made by settlers on the tract. In order to obtain the money it is necessary to make the project commercially successful. The company is asking its legal rights in order that it may be in a position to accomplish this end. As matters stand now its hands are tied.

In conclusion, we say that the question as to the sufficiency of the water supply was determined in advance by the State and by the National authorities. That it was the duty of the Secretary of the Interior to determine this question in advance. That he could not shirk

this responsibility, and that he could not recall his approval after the works have been completed. That the determination as to the water supply being final that no further question can arise thereon in this suit.

Furthermore we say that there was no contract made for the delivery of any specific amount of water; that a water right for the entire tract was taken out in bulk, and that the right of each settler is a proportionate interest therein. That the lien upon the land was fixed in advance, and was intended to be fixed prior the issuance of patent and to be valid from the time it was fixed. That the question of the sufficiency of the water supply must be determined when the plans are presented to the Secretary, instead of when the papers are presented for patent.

That the estimate of the water supply was based upon the amount of water flowing into the reservoir. That the estimate of 2.75 acre feet per acre for each acre was based upon this measurement at that point, and that there is nothing in the entire transaction, or in the contract, to justify the place of measurement fixed by the court. The main question discussed in the original brief was as to whether or not testimony might be introduced to show the inadequacy of the water supply or the area which the apparent present supply would irrigate. And as to this point, we rest upon the argument presented in the original brief.

Respectfully submitted,

SAMUEL H. HAYS,

Solicitor for Twin Falls-Salmon River Land & Water Co.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TWIN FALLS-SALMON RIVER LAND AND WATER COMPANY, a corporation, SALMON RIVER CANAL COMPANY, LIMITED, a corporation, COMMONWEALTH TRUST COMPANY OF PITTSBURG, Trustee, and A. C. ROBINSON, Appellants,

vs.

A. E. CALDWELL, W. F. MIKESELL, V. E. MORGAN, J. E. POHLMAN, W. C. POND, JAMES W. BEAUCHAMP, CARL WASHBURN and HAROLD M. SIMS, in their own behalf and in behalf of all persons similarly situated with them, Appellees.

REPLY BRIEF OF APPELLEES

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Filed

SEP 13 1916

E. D. Monckton,

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REPLY BRIEF OF APPELLEES

STATEMENT OF THE CASE.

A reply brief becomes necessary only because of the many misstatements, inaccuracies and "half-truths" set forth in the supplemental brief of appellant. Such brief also contains numerous statements totally unsupported by the record, and no folio is cited directing our attention to the portion of the record relied upon.

Pursuant to the provisions of our Idaho laws, a certain contract was entered into by the State, on the one hand, and the defendant irrigation company on the other. The laws of the State providing for this contract, the contract actually entered into pursuant to such laws and the contract entered into between the irrigation company and the settlers, should

be looked to for a determination of the rights of the parties to this action. For convenience, we refer to the contract between the State and construction company as the "State" contract; (see Plaintiff's Ex. "A" p. 42 trans.) and the contract between the Construction company and the Settlers as the "settlers" contract; (Ex. "C", p. 62 trans.) although the two contracts become one, and must be construed as such.

Appellant in persistently claiming that no water right was sold, clearly mis-states the provisions of Sec. 1621, Rev. Codes, Idaho. On page 3 of the supplemental brief, in referring to this section, it is said that "the contract must contain complete specification of the works to be built, the cost to the settlers, and the terms on which the state will dispose of its lands." The one provision of this statute which seems to us vital has been omitted. It will be observed that from the quotation one would be justified in concluding that the "works" only were to be sold to the settlers. Sec. 1621, provides:

1. "Contain complete specifications of the location, dimensions, character and estimated cost of the proposed ditch, canal or other irrigation works;"
2. "The price and terms per acre at which such works **and perpetual water rights** shall be sold settlers;"
3. "And the price and terms upon which the State is to dispose of the lands to the settlers."

From the foregoing it clearly appears that the contract must provide that in addition to the "works," "perpetual water rights," are sold the settlers.

Equally misleading is the next paragraph on page 3 of supplemental brief. Here we are told that under the Statute, Sec. 1615, "the right of the settler to the water represented by the permit taken out for the entire tract is a proportionate interest therein." This is but half the truth, and in reality deals with the unimportant half.

Under Sec. 1615, a proposal to the State, for the construction of the works, must be made by the person or corporation desiring to proceed under the Carey Act.

The proposal is, as a matter of fact, an offer, which when accepted by the State, requires the execution of the contract provided for by Sec. 1621, and the acceptance of such proposal constitutes the contract between the parties. The proposal, therefore, contains:

1. The source of water supply and general character of irrigation system to be constructed.
2. The price and terms for a "perpetual water right, etc." "said perpetual right to embrace a proportionate interest" in the works of diversion.

This is not as counsel would have it, and not as counsel has stated the statute to be, for the reason, that counsel has stated that the water right was to be proportionate; while the statute says the water right shall be perpetual and shall embrace a proportionate interest in the works.

The reason for this is obvious: The water is divided among the settlers and so received and used according to the crops planted; any division of the works would be impracticable and defeat the object of the act.

Under the theory of counsel the less includes the greater; or, the greater and more important right is ignored if not entirely denied.

The instances cited contain perhaps the mis-statements or misconstruction of our statutory provisions most important to bear in mind in considering the contracts involved in this litigation.

So many alleged facts are referred to in the brief to which the record gives no support, that it is almost impossible to call these to the attention of the court in detail. Many are of sufficient importance, however, so that the question must be

raised.

For instance, we are told the State Engineer "reported that the water supply was sufficient for the irrigation of 150,000 acres of land." We do not find any such report in the record.

Next, that at the time of the hearing in the Court below, "a very considerable acreage had been forfeited, so that the project had been reduced in area to 57,348 acres." (p.4 arg.) This is untrue, both as to the fact, and the legal result claimed. Mr. Hall, manager and witness for the defendant irrigation company, states: (p. 219 trans.) "Of the 21,711 acres not proved up there were about 16,000 acres on which no cultivation had been made, and on which no one was living, and there were about 5,700 acres which were occupied and farmed, on which people were living, but had not yet made their final proof, but could do so at any time. Eliminating the entries where there has been no cultivation and settlement, the net area of this project is about 57,348 acres." There is a vast difference between the two statements. Failure to make the proof of cultivation under the statute made the entry subject to contest and **re-entry**—assuming Barnum's axiom is still operative; but in any event the water contract and the obligation to furnish water thereunder was still outstanding and by no means forfeited.

The next statement of which we complain is concerning the water supply (p. 5). As heretofore suggested, we do not find anything in the record to support the alleged report of the State Engineer regarding 400,000 acre feet. But the reasoning employed in this paragraph is altogether faulty and misleading for the reason, that reservoir and transmission losses are entirely ignored in the equation. Mr. Darlington, water master for the company, testified (p. 141 trans.) "In 1912 the transmission loss was about 50 per cent.; in 1913, 33 per cent.; in

1914, 27.3 per cent. The reservoir losses for 1912 were 64,181 acre feet (32 per cent.) ; in 1913, 46,314 acre feet (42 per cent.) ; in 1914, 38,032 (28 per cent.) acre feet.

Why the brief of appellant should refer and be burdened with special reports of Senate committees, irrigation manuals and treatises, reports of the Land Commissioner and similar matter having no authenticity or binding force or effect as legal precedent is more than we can fathom. At least, we do not feel justified in searching for the writings of others having contrary views, theories or opinions.

ISSUES.

We wish to propose another classification of the issues than the one presented by appellant.

1. Did the settler purchase a water right?
2. Will patent issue from the United States to the lands entered, without the showing being affirmatively made that "an ample supply of water is actually furnished in a substantial ditch or canal?"

The appellant in the supplemental brief for the first time has very nearly permitted himself to go on record upon the proposition of whether the irrigation company did, or did not agree to sell a water right. For on page 4 in stating their position they say, the company "did not enter into any covenant, either temporary or perpetual, whereby it agreed to furnish the water supply claimed during each irrigation season." As usual, counsel has so burdened this statement with qualifications—has left so many loop holes—that it may mean something or nothing. If counsel means that his company has sold no water right, then we take issue with him. If he means that his company did not sell a water right which would amount to 2.75 acre feet in a season of abnormal, exceptional drought, we would not take exception, although the question is at least de-

batable; if he means no water right was sold which would give the settler 2.75 acre feet in the normal year, or an average of such an amount over a period of years, we will take issue. And likewise, if he means that he has sold a water right to be measured by the proportion of what there is to deliver—be it something or nothing.

Our experience in this case, however, has lead us to conclude that we have no reason to expect a specific statement upon this very vital point.

Of course, counsel knows that the last part of the statement contained in the paragraph at the top of page 5 is not supported by the record and untrue as a matter of fact. It might be urged that because of the making of the contract by the State Land Board, one would have the right to assume that the provisions of the law had been complied with, and that the State Engineer had in fact, examined the water supply; but aside from this assumption the statement is misleading, and as suggested, untrue.

Before taking up the issues hereinbefore suggested, we wish, if possible, to follow the argument of appellant as set forth in the supplemental brief.

Briefly reviewing the position taken by counsel, we gather that his position is in substance: that the Carey Act had for its object the reclamation of the Desert lands of the United States; that the Company undertaking to build the works was simply a Construction Company and received pay only for the cost of the works, and did not covenant or agree to sell or deliver a water right. That in order to accomplish these things, a Construction Company must make a proposal to the State, and again we refer to the statement of counsel, in this connection, because of the evident attempt to eliminate the meat of the section of the statute: "the proposal must state the source of water supply, the location and dimensions of the proposed

works and estimated cost thereof, the price and terms per acre at which perpetual water rights representing a proportionate interest in the irrigation works and water supply will be sold to the settlers" (p. 11), when as hereinbefore set forth, this is not the provision of the statute at all, and for what reason counsel persistently refuses to correctly quote the provision of the statute, wherein it is provided that the proposal shall contain "the price and terms per acre at which perpetual water rights will be sold to settlers on the land to be reclaimed, said perpetual rights to **embrace** a proportionate interest in the canals or other irrigation works," is more than we can understand, unless this particular and especial provision in the statute is something counsel cannot and will not meet, explain or overcome.

It appears to be the further contention that this proposal should be considered as a bid for the doing of the work and the "statute" may be considered as an advertisement for "bid." Nothing could seem more ridiculous than this statement, if it is to be considered a legal argument. The proposal is nothing short of an offer to do certain things required by the statute, which, if accepted as provided by Section 1619, a contract is then entered into as provided by Section 1621, which, according to the ordinary rules of law, contains all of the terms and conditions of the offer as accepted; thereby showing the meeting of the minds of the contracting parties upon the identical thing to be done and performed.

Reference is made to the fact that there are certain provisions incorporated in the Idaho contracts relating to Carey Act matters in addition to those prescribed by statute, and that, therefore, any matters so incorporated are without any sanction and void. We cannot see precisely the purpose of this statement appearing on page 14.

Another characteristic of appellant's argument, which, but

for the necessity of replying thereto, would amuse us, is the disposition of counsel to make some long quotation from the report of an irrigation engineer, State engineer or alleged specialist in irrigation matters, and then follow it up by the trite saying, "decisions of the Supreme Court of the State of Idaho are to the same effect." We would seem entitled in this case to the statement of the Court in the first instance, because we have the right to assume that if the point has been decided by the Court, it will be tersely stated, and fairly well expressed. At least, we should not be compelled to go outside of the decisions of the Courts to secure our law, if the Courts have passed upon the same matter precisely.

As to why counsel felt called upon to discuss the debates in Congress as to the lien to be fixed in favor of the Construction Company, we are not advised, and do not feel required to enter into a discussion of this matter.

Counsel next advises us that the State Engineer whose duty it is to first investigate the proposal or offer of the Construction Company to enter into a contract for the construction of irrigation works under the Carey Act, being a State officer, his acts in the matter are conclusive upon all persons interested. In other words, we are met with the rather astonishing proposition that if a State Engineer, who may be guilty of gross negligence or actuated by corrupt motives, advises the State Land Board that there is water in a stream sufficient to irrigate a certain project, when there is not, that such action on the part of such a State official is conclusive upon the settler and all other persons concerned, including the United States Government, who may thereafter deal with the matter, under the assumption that the official has properly performed his duty. In other words, that the fraud, corruption or neglect of a State official is conclusive and binding upon all who may have occasion thereafter to deal or become related in any way to the subject mat-

ter. We do not believe this to be the law, and will discuss this later.

We confess our inability to follow the argument of appellant and reply thereto. If the State and Federal laws do not require the settler to have a water right to reclaim his land before he can demand patent, then we will grant that all counsel has said, and that the statements quoted from irrigation engineers are decisive. If, on the other hand, we are required to have a water right, we have not succeeded in getting one unless from the defendant construction company.

We wish, therefore, to discuss the issues as hereinbefore proposed:

DID WE PURCHASE A WATER RIGHT?

The provisions of the Statute supporting our contention that we bought and are, therefore, entitled to receive a water right follow:

The proposal or offer of construction company must contain "the price and terms per acre at which perpetual water rights will be sold settlers;"

Sec. 1615, Rev. Codes.

The "State" contract to be entered into by the State and construction company must contain "the price and terms per acre at which such works and perpetual water rights shall be sold to settlers:"

Sec. 1621, Rev. Codes.

Then under the section giving the construction company a lien for price agreed upon, "any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which water is used" for all payments due under contract.

Sec. 1629, Rev. Codes.

It may be that the Company has not agreed to "furnish

water," and if so, they have no lien for contract price, as the "furnishing water" seems to be a condition precedent to the right to a lien.

Now as to the contracts:

Paragraph 1, "State" contract, (p. 43 trans.) in setting forth the purpose of contract: "to sell shares or water rights in the canal or irrigation system."

According to the authorities cited by appellant, no provision of the contract became binding upon any one, unless authorized by the so-called Carey Act statutes of the State. These statutes clearly provide for the sale of water rights, not shares of stock.

See also "Price of Water Rights." (p. 50 trans.)

It is further agreed that no water right be sold beyond the amount of water appropriated.

State Contract p. 52. Trans.

Of course, if appellants contention be accepted, and the fact of having filed a permit covering sufficient water to supply 2.75 acre feet to the settler, be sufficient and conclusive, regardless of whether there was any water in the stream subject to appropriation, there is nothing further to be said upon this point. But if this is the correct rule, why was such provision put in the contract? Being there, it must be given force and effect if possible. It cannot be said that the provision means that no water rights should be sold in excess of 150,000 acres; because this was the maximum allowed by the contract. Water cannot be "appropriated" unless it be in the stream and subject to diversion. An application to appropriate 1000 sec. feet of the waters of a stream containing but 500 second feet of unappropriated water would be an appropriation of but 500 second feet. And an agreement not to sell more water rights than the amount appropriated, does not present a complex or unusual provision. The situation, however, afforded when one has sold

more water than can be delivered is not without its complex and disagreeable features.

We next turn to the Federal law to ascertain what bearing it may have upon the question proposed.

The provisions of the Act in point are :

1. A right to contract with the State to donate and patent to the State 1,000,000 acres of land which the State may cause to be irrigated, reclaimed and occupied.
2. Before the application of the State is allowed or any contract made for the ultimate reclamation of the lands, or any segregation of the lands ordered, the State must fully disclose how such irrigation and reclamation is to be accomplished.
3. Then if the lands are segregated upon such showing, and not until the segregation has been made, the State is authorized to enter into contracts to cause the lands to be reclaimed, and to induce their settlement in accordance with and subject to the provisions of the act.
4. A lien for the work of reclamation is authorized.
5. "And, when an ample supply of water is actually furnished in a substantial ditch or canal * * * then patents shall issue for the same to such state."

(See p. 4. Res. brief.)

Appellant takes the position that the State Engineer having approved the project, the Department of the Interior having approved the plan and segregated the land and the contract having been entered into, such steps are not only conclusive upon all concerned, but entitle the settler to a patent, regardless of the water supply. In other words, that when the plan was approved and the segregation made, the grant from the United States passed and became on **in praesenti**; and this regardless of performance of the plan so proposed.

The fact that under the Federal law, after the segregation is

made the law provides that the State shall then make a contract for the reclamation of the land is apparently ignored. Also, that by the express provision of the Federal Act, patent does not and will not issue until an ample supply of water has been furnished. Furnished by who? Not by the State, because under the express terms of the State law, the construction company must sell water rights. They must not only agree to sell water rights, but until water has been "furnished" no lien for purchase price is created.

In view of the plain provisions of the Federal law, can it be seriously contended that the grant is one *in praesenti*.

It is true that some State Engineer has so declared it (see appellant's original brief p. 41); but there is authority to the contrary; in the case of *McKinney vs. Big Horn Basin Dev. Co.*, 167 Fed., 770; S. C. 93 C. C. A., 258 (8th Cir.) it was held:

"The underlying purpose of the acts of Congress in ceding the vast domain of desert lands within the territorial limits of the given states was, through the agency of the state government more immediately concerned, to speedily have them reclaimed from an unproductive waste by means of artificial irrigation, * * *. But Congress did not make the grant to the State of such lands in mass to take effect *in praesenti*. The State was first to furnish satisfactory evidence to the Secretary of the Interior that the lands are irrigated, reclaimed, and occupied by actual settlers before any patent should issue therefor." (The black face type our own.)

This case, in reality disposes of every contention made by appellant. It clearly holds that irrigation, and reclamation are the tests, and that without performance in these respects, no patent will issue.

The fact that lands cannot be irrigated or reclaimed except by water will be conceded by all, we believe, and so, unless the settlers have a water right in addition to an interest in a reservoir and ditches, they have failed in the one respect made vital

by the laws of Congress.

The case is important in another aspect. The Federal law did not give the State the right to enter into a contract for the reclamation of these lands by the sale of shares of stock in an irrigation company which might or might not have water; and it appears from the opinion that any contract entered into by the State not in compliance with and for the furtherance of the declared legislative policy of the Federal government, would be void and of no effect.

The facts are that the settlers upon the Salmon have shares of stock in an irrigation company; but no water right, at least, not the one agreed upon; and it is now the claim of the Company which they are attempting to force upon the settler by various foreclosure suits that no water right was sold, at least, no more than a proportionate interest in what water may be available—be that something or nothing. That the Company only agreed to construct an irrigation system, and this is what they are asking and seeking to enforce pay for.

We again quote from McKinney case:

“The assertion of such a right flies in the face of a fundamental principle of law, that, where a grant of power under a statute is given for the accomplishment of the state’s policy, the due performance of the function by the grantee is the consideration for the public grant; and consequently any contract by the grantee which tends to disable it from performing its entire function by undertaking to transfer to others the discharge thereof, with an effect, different from the grant, is violative of the contract with the state and contrary to public policy.”

Citing:

York vs. Ry., (U. S.), 15 L. Ed., 27;

Thomas vs. Ry. (U. S.), 25 L. Ed., 950;

and further:

“Every person dealing with such grantee of a privilege or right must take notice of the limitations placed thereon

by the creative act."

Now assume the State had made a contract which would sustain the contention of appellant in all respects; when the settler comes to the Federal government and asks for a patent and bases the request upon shares of stock in an irrigation company which has no water to deliver its stockholders for the irrigation or reclamation of the lands, a refusal would follow as a matter of course.

Nor can the appellant claim any immunity from the operation of the rule referred to because the State Engineer may have passed upon the sufficiency of the water right, and the Company proceeded to expend vast sums in building an irrigation system.

If there was in fact insufficient water in the source of supply, the approval of the State Engineer did not supply the deficiency, and it was the duty of the contractor,—appellant Land and Water Company—to know that the object and requirements of the legislative grant could be complied with and performed; especially when such company were relying upon the express terms of such grant and are now insisting upon the lien given thereby when water is furnished.

We quote further from the opinion:

"It is no answer to say that after the original contractor, the appellee, had stood by and permitted the appellant to proceed to incur expense and give his time and labor in execution of the contract, it should now be estopped to deny its accountability under the contract. The answer to this is fully made by Mr. Justice Miller in *Thomas vs. Railroad Co.*, supra: 'It is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a right-

ful act when it was done. Can this performance of a legal duty, a duty both to the stockholders of the company and to the public, give to plaintiff a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts.' "

In the McKinney case the vice found by the court was in the fact that the contract did not in express terms fix the price and terms for a water right; but left this optional with the promotor. Can it be said that a contract failing in this statutory requirement would be in any manner different from one which did not sell a water right to the settler?

If the Court should conclude from the foregoing that the settler did in fact, and must, as a matter of law, have purchased a water right, the next question is, how much of a water right did he purchase?

We must abandon the "proportionate" interest theory, at least, as urged by appellants. Because the proportionate interest so contended for might be something or nothing. In any event, it might not be "an ample supply of water in a substantial ditch." So that we must proceed upon the theory that compliance with the requirements of the Federal law was intended. And that, therefore, a "proportionate" interest in an insufficient supply would not comply with the requirements noted.

In this connection it should be observed that the word "proportionate" is employed in the statute in connection with the interest to be owned by the settler in the "canal or other irrigation works." (Sec. 1615, Rev. Codes.) And not in connection with the water.

Reference to the contract between the parties does not, we

concede, afford any easy, simple solution. We are almost tempted to conclude that the contract in question was written by the same hand which drafted the argument for appellant herein. Upon reference to the affidavit upon p. 308 of transcript, the suspicion is in all things confirmed.

We will call the Court's attention to paragraph 4 of the State contract, which is as follows:

"APPROPRIATION OF WATER."

"The party of the second part is the owner of that certain water right * * * * to be used for the irrigation of the lands described in Exhibit "A" herewith * * * * and it is agreed and understood that the dam hereinbefore mentioned, shall be constructed so as to provide a reservoir for the impounding of 180,000 acre feet of water, which amount, in addition to the normal flow of said stream, during the irrigation period, has been determined to be sufficient to furnish two and three-fourths acre feet of water per acre for each acre of land to be irrigated."

This, we believe, to be the only provision in the State or Settlers contract relating to the amount of water to be furnished the settlers under the project.

Appellant, of course, contends that the amount of water fixed in this paragraph of the contract relates to "capacity" rather than water to be furnished the settlers. In fact, the supplying of capacity is the claimed performance all the way through rather than the actual delivery of any water right.

But we believe it to be pertinent to inquire why any determination of the amount of water to be delivered was necessary unless it was expected that such an amount of water should be actually delivered?

The Federal Government only requires that "an ample supply" be furnished. Why should it not be determined by the State and the Construction Company as to what such ample

supply should be; a standard fixed, in other words? And why was it not important for the State and Construction Company to fix the amount to be delivered in view of the fact that a settler proposing to enter lands under this project and purchase a water right would naturally first inquire as to what water right he should receive?

The amount of water delivered to settlers upon the arid lands of the West is the principle factor in determining the value of such lands, either from the standpoint of production or from any other.

In any event, the State of Idaho on the one hand, and the appellant Company on the other, determined that the water to be impounded, together with the normal flow of the stream, was sufficient to furnish two and three-fourths acre feet of water for each acre of land to be irrigated.

Under the well recognized rules of construction, we should not ignore this clear provision of the contract; but should give it force and effect, if possible. It is, of course, true, that the Federal Government might conclude when proof was ultimately submitted, that the two and three-fourth acre feet so agreed upon would not be the ample supply required to irrigate and reclaim the land; but this is anticipating and not a matter now to be decided. We are safe in saying, however, the Federal Government would not say that too much water was furnished.

Upon this question generally, we have nothing further to suggest at this time than as urged in our original argument, and more especially is this true because of the consideration and analysis given this phase of the case by the learned trial court.

Respectfully submitted,

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